012 Foreign Employees: Issues in Hiring This New Work Force

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Faculty Biographies

Ida L. Castro

Ida L. Castro is chair of the U.S. Equal Employment Opportunity Commission in Washington, DC. She was nominated by the President of the United States to lead legal and policy development and administer $247 million civil rights enforcement agency. She also acts as the EEOC's general counsel, overseeing approximately 300 lawyers.

Ms. Castro previously served the U.S. Department of Labor as deputy assistant secretary—Office of Worker's Compensation, acting deputy solicitor, and director of the Women's Bureau.

Ms. Castro served as senior legal counsel to the New York Health and Hospitals Corporation, as director of labor relations and counsel to the president of the City University of New York—Hostos Community College, as associate counsel for Eisner, Levy, Pollack & Ratner, PC, as assistant deputy public advocate for New Jersey Public Advocate—Public Interest Advocacy, associate counsel for Giblin & Giblin, PC, and associate professor (tenured) for Rutgers—The State University, Institute of Management and Labor Relations. Ms. Castro also served as director of planning and program development of the Middlesex County CETA, job development supervisor of the Jersey City CETA, and director of the Carolina CETA/MDTA.

Ms. Castro received three Vice Presidential awards for improved government services and has entered Rutgers Alumni Hall of Fame.

Ms. Castro received a BA *cum laude* from the University of Puerto Rico and an MA from Rutgers University. She then received her JD from Rutgers School of Law and her PhD (honoris causa) from St. Joseph's College.

Hugo Chaviano

Hugo Chaviano is a senior member and chair of the Latin American Practice Group at Cozen & O'Connor.

Previously, Mr. Chaviano was a capital partner in the law firm of Blatt, Hammesfahr & Eaton, which merged with Cozen & O'Connor in the year 2000.

He is a past president of the Hispanic National Bar Association(HNBA). He has also served as president of the Hispanic Alliance for Career Enhancement. He has been recognized by Hispanic Business Magazine as one of the 100 Most Influential Hispanics in the United States. Mr. Chaviano is ambassador to the Business Law Section of the ABA and a past member of its House of Delegates. He is also a member of the Chicago Bar Association Special Committee on Judicial Reform and Blue Ribbon Committee on Diversity in the Profession. He serves on the Boards of the Chicago Children's Museum and Metropolitan Family Services. Mr. Chaviano has served as a member of the Board of Managers of the Chicago Bar Association and has chaired its Judicial Evaluation Appellate Review and Insurance Law Committee. He has also served on several other Blue Ribbon

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committees, including the Judicial Merit Selection Panel of the United States District Court for the Seventh Circuit and the Circuit Court of Cook County-Illinois-Mediation Program. He is an adjunct professor of law in trial advocacy at Northwestern University School of Law and has served as instructor at the National Institute of Trial Advocacy. Mr. Chaviano is a certified Mediator and Arbitrator. Mr. Chaviano received the National Mercurio Award, the highest award given by the Cuban American Chamber of Commerce to a Cuban who has achieved national prominence in business or a profession and who has a demonstrated record of humanitarian service to the community.

Mr. Chaviano is a graduate of Rutgers University and Northwestern University School of Law.

Cynthia Juarez Lange

Cynthia Juarez Lange is a partner practicing in the West Coast offices of Fragomen, Del Rey, Bernsen & Loewy, P.C.

Ms. Lange was formerly a trial attorney with the Immigration and Naturalization Service and heads Fragomen's IRCA Compliance Practice Group.

Ms. Lange has been certified as a specialist in immigration law by the State Bar of California and has also been adjunct professor of law at Southwestern University School of Law for 13 years. She is a frequent lecturer on immigration law and has written articles on business immigration law matters for numerous publications. Ms. Lange is a member of the ABA, the California State Bar Association, the New York State Bar Association, and the Washington DC Bar Association. She served as chair of the American Immigration Lawyers Association's National Employer Sanctions Committee the Century City Bar Association's Immigration and Nationality Law Committee, and the Beverly Hills Bar Association's Immigration Law Section.

She received her BA from Brigham Young University and her JD from Southwestern University School of Law, Moot Court Honors Program, Board of Governors.

Gema M. Pinon

Gema M. Piñón is the assistant general counsel for Norwegian Cruise Line in Miami. In her position, she serves as legal counsel for all activities conducted by the business including legal aspects of government relations, business contracts, immigration matters, corporation organization, acquisition and sale of assets, and all other areas of business. Norwegian Cruise Line is one of the largest international cruise ship operators in the world and currently owns or operates a fleet of eight ships sailing to more than 200 ports around the world.

Prior to joining Norwegian Cruise Line, Ms. Piñón served as general counsel for a startup international telecommunications company, based in Mexico City. Prior to that, she was in private practice for over seven years in South Florida, where she represented and advised clients in various commercial, corporate, and financial transactions.

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She is a member of the Hispanic National Bar Association(HNBA), and was a member of its board of governors, serving as its general counsel for two years, and vice president, external affairs for one year. She is a member of numerous civic organizations.

Ms. Piñón received her AB *magna cum laude*, MBA with honors, and JD *cum laude* from the University of Miami. Ms. Piñón is fluent in Spanish, French, and Portuguese.

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FOREIGN EMPLOYEES:
ISSUES IN HIRING THIS NEW WORK FORCE

Additional EEOC Hypotheticals

Hypothetical #1

Your are an agribusiness company and you use a temporary staffing firm to hire farm workers from Mexico to do seasonal work. The staffing firm takes care of obtaining the appropriate work authorization for all foreign farm workers. From past practice, it is clear that work authorization is relatively easy to obtain for these workers. Because of the arduous nature of the work, the staffing firm screens out individuals over age 40 and all persons with disabilities. When a rejected Mexican worker files a charge of discrimination with EEOC, you find out about the temporary agency's screening process. What do you do?

Issues presented

Visa for seasonal agricultural workers - H2A visas
Can foreign employees file charges with EEOC?
Are temporary staffing firms subject to federal employment discrimination laws?
Can the company be liable for the illegal practices — either known or unknown — of the temporary staffing firm?
Joint employer theory of liability

Hypothetical #2

You are a healthcare company in dire need of registered nurses given a severe shortage of these workers in your particular geographical location. You petition the INS and receive the appropriate authorization to hire foreign registered nurses. As a provision of this agreement, you promise to employ the foreign workers as registered nurses and to pay them the same wages that you pay U.S. registered nurses. However, once the foreign employees arrive, you decide to pay them less than their U.S. counterparts and assign them as nurses aides and technicians instead of registered nurses.

Issues presented

Legal obligations of hiring foreign employees
Are foreign employees protected by federal civil rights laws?
Does the change in assignment and wages violate Title VII?
Can you treat foreign workers differently than U.S. workers?

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Hypothetical #3

Your widget manufacturing company has hired welders from various foreign countries. The workers all operate heavy welding machinery on the plant floor. Given the company's emphasis on safety, you advise the company's Board of Directors to institute a policy that requires that English be spoken at all times. Some supervisors seeking to enforce the policy have harassed and disciplined workers for speaking foreign languages in the lunchroom. In addition, you find out that some U.S. workers are making fun of the foreign workers' accents and telling them to go back to their home countries. Some of the foreign workers even allege that they have received threats of violence for "taking" American jobs. What do you do?

Issues presented

English-only policies in the workplace — business necessity
Impact of language and accent discrimination
Recognition that hiring foreign employees leads to a diverse workforce
Businesses need to have general harassment policies and procedures — and policies should be disseminated to all employees
Best practices: diversity training and cultural competency

Hypothetical #4

You are contacted by a human resources manager who tells you that she has heard rumors that the restaurant workers are beginning to talk about unions. In fact, the leaders of the movement toward unionization appear to be some foreign workers that the company hired from various eastern European countries. Spurred by the perception that they are being treated discriminatorily because of their national origin, the foreign workers set up a meeting with potential union representatives. A few weeks later, the human resources manager advises you that she has received a letter from the Social Security Administration indicating that some of the social security numbers of the foreign workers cannot be confirmed by the agency. What should you do?

Issues presented

Foreign workers and unions in the workplace
Are undocumented workers protected by federal civil rights laws?
Legal obligations to comply with immigration laws
Retaliation for attempts to unionize and/or complaints of discrimination

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Title 29 — Labor
CHAPTER XIV — EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1606 — GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

1606.1 Definition of national origin discrimination.
1606.2 Scope of title VII protection.
1606.3 The national security exception.
1606.4 The bona fide occupational qualification exception.
1606.5 Citizenship requirements.
1606.6 Selection procedures.
1606.7 Speak-English-only rules.
1606.8 Harassment.

Sec. 1606.1 Definition of national origin discrimination.

The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply general title VII principles, such as disparate treatment and adverse impact.

Sec. 1606.2 Scope of title VII protection.

Title VII of the Civil Rights Act of 1964, as amended, protects individuals against employment discrimination on the basis of race, color, religion, sex or national origin. The Title VII principles of disparate treatment and adverse impact equally apply to national origin discrimination. These Guidelines apply to all entities covered by title VII (collectively referred to as "employer").

Sec. 1606.3 The national security exception.

It is not an unlawful employment practice to deny employment opportunities to any individual who does not fulfill the national security requirements stated in section 703(g) of title VII.[1]

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[1] See also, 5 U.S.C. 7532, for the authority of the head of a Federal agency or department to suspend or remove an employee on grounds of national security.

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Sec. 1606.4 The bona fide occupational qualification exception.

The exception stated in section 703(e) of title VII, that national origin may be a bona fide occupational qualification, shall be strictly construed.

Sec. 1606.5 Citizenship requirements.

(a) In those circumstances, where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by Title VII.[2]
(b) Some State laws prohibit the employment of non-citizens. Where these laws are in conflict with Title VII, they are superseded under section 708 of the title.

Sec. 1606.6 Selection procedures.

(a)(1) In investigating an employer's selection procedures (including those identified below) for adverse impact on the basis of national origin, the Commission will apply the Uniform Guidelines on Employee Selection Procedures (UGESP), 29 CFR part 1607. Employers and other users of selection procedures should refer to the UGESP for guidance on matters, such as adverse impact, validation and recordkeeping requirements for national origin groups.
(2) Because height or weight requirements tend to exclude individuals on the basis of national origin,[3] the user is expected to evaluate these selection procedures for adverse impact, regardless of whether the total selection process has an adverse impact based on national origin. Therefore, height or weight requirements are identified here, as they are in the UGESP,[4] as exceptions to the "bottom line" concept.

(b) The Commission has found that the use of the following selection procedures may be discriminatory on the basis of national origin. Therefore, it will carefully investigate charges involving these selection procedures for both disparate treatment and adverse impact on the basis of national origin. However, the Commission does not consider these to be exceptions to the "bottom line" concept: (1) Fluency-in-English requirements, such as denying employment opportunities because of an individual's foreign accent,[5] or inability to communicate well in English.[6]

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[2] See Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 92 (1973). See also, E.O. 11935, 5 CFR 7.4; and 31 U.S.C. 699(b), for citizenship requirements in certain Federal employment.
[3] See CD 71-1529 (1971), CCH EEOC Decisions para. 6231, 3 FEP Cases 952; CD 71-1418 (1971), CCH EEOC Decisions para. 6223, 3 FEP Cases 580; CD 74-25 (1973), CCH EEOC Decisions para. 6400, 10 FEP Cases 260. Davis v. County of Los Angeles, 566 F.2d 1334, 1341-42 (9th Cir. 1977), vacated and remanded as moot on other grounds, 440 U.S. 625 (1979). See also, Dothard v. Rawlinson, 433 U.S. 321 (1977).
[4] See section 4C(2) of the Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607.4C(2).
[5] See CD AL68-1-155E (1969), CCH EEOC Decisions para. 6008, 1 FEP Cases 921.
[6] See CD YAU9-048 (1969), CCH EEOC Decisions para. 6054, 2 FEP Cases 78.

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(2) Training or education requirements which deny employment opportunities to an individual because of his or her foreign training or education, or which require an individual to be foreign trained or educated.

Sec. 1606.7 Speak-English-only rules.

(a) When applied at all times. A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.[7] Therefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it.

(b) When applied only at certain times. An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

(c) Notice of the rule. It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

Sec. 1606.8 Harassment.

(a) The Commission has consistently held that harassment on the basis of national origin is a violation of title VII. An employer has an affirmative duty to maintain a working environment free of harassment on the basis of national origin.[8]

(b) Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct: (1) Has the purpose or effect of creating an intimidating, hostile or offensive working environment; (2) Has the purpose or effect of

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[7] See CD 71-446 (1970), CCH EEOC Decisions para. 6173, 2 FEP Cases, 1127; CD 72-0281 (1971), CCH EEOC Decisions para. 6293.

[8] See CD CL68-12-431 EU (1969), CCH EEOC Decisions para. 6085, 2 FEP Cases 295; CD 72-0621 (1971), CCH EEOC Decisions para. 6311, 4 FEP Cases 312; CD 72-1561 (1972), CCH EEOC Decisions para. 6354, 4 FEP Cases 852; CD 74-05 (1973), CCH EEOC Decisions para. 6387, 6 FEP Cases 834; CD 76-41 (1975), CCH EEOC Decisions para. 6632. See also, Amendment to Guidelines on Discrimination Because of Sex, Sec. 1604.11(a) n.1, 45 FR 74766-74677 (November 10, 1980).

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unreasonably interfering with an individual's work performance; or (3) Otherwise adversely affects an individual's employment opportunities.
(c) An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of national origin regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.
(d) With respect to conduct between fellow employees, an employer is responsible for acts of harassment in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action.
(e) An employer may also be responsible for the acts of non-employees with respect to harassment of employees in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Facts About National Origin Discrimination

Title VII of the Civil Rights Act of l964 protects individuals against employment discrimination on the basis of national origin as well as race, color, religion and sex.

It is unlawful to discriminate against any employee or applicant because of the individual's national origin. No one can be denied equal employment opportunity because of birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group. Equal employment opportunity cannot be denied because of marriage or association with persons of a national origin group; membership or association with specific ethnic promotion groups; attendance or participation in schools, churches, temples or mosques generally associated with a national origin group; or a surname associated with a national origin group

SPEAK-ENGLISH-ONLY RULE

A rule requiring employees to speak only English at all times on the job may violate Title VII, unless an employer shows it is necessary for conducting business. If an employer believes the English-only rule is critical for business purposes, employees have to be told when they must speak English and the consequences for violating the rule. Any negative employment decision based on breaking the English-only rule will be considered evidence of discrimination if the employer did not tell employees of the rule.

ACCENT

An employer must show a legitimate nondiscriminatory reason for the denial of employment opportunity because of an individual's accent or manner of speaking. Investigations will focus on the qualifications of the person and whether his or her accent or manner of speaking had a detrimental effect on job performance. Requiring employees or applicants to be fluent in English may violate Title VII if the rule is adopted to exclude individuals of a particular national origin and is not related to job performance.

HARASSMENT

Harassment on the basis of national origin is a violation of Title VII. An ethnic slur or other verbal or physical conduct because of an individual's nationality constitute harassment if they create an intimidating, hostile or offensive working environment, unreasonably interfere with work performance or negatively affect an individual's employment opportunities.

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Employers have a responsibility to maintain a workplace free of national origin harassment. Employers may be responsible for any on-the-job harassment by their agents and supervisory employees, regardless of whether the acts were authorized or specifically forbidden by the employer. Under certain circumstances, an employer may be responsible for the acts of non-employees who harass their employees at work.

IMMIGRATION-RELATED PRACTICES WHICH MAY BE DISCRIMINATORY

The Immigration Reform and Control Act of 1986 (IRCA) requires employers to prove all employees hired after November 6, 1986, are legally authorized to work in the United States. IRCA also prohibits discrimination based on national origin or citizenship. An employer who singles out individuals of a particular national origin or individuals who appear to be foreign to provide employment verification may have violated both IRCA and Title VII. Employers who impose citizenship requirements or give preference to U.S. citizens in hiring or employment opportunities may have violated IRCA, unless these are legal or contractual requirements for particular jobs. Employers also may have violated Title VII if a requirement or preference has the purpose or effect of discriminating against individuals of a particular national origin.

FILING A CHARGE

If you believe you have been discriminated against on the basis of national origin, you are entitled to a remedy that will place you in the position you would have been in if the discrimination had never occurred. You may be entitled to hiring, promotion, reinstatement, back pay or other remuneration. You also may be entitled to damages to compensate you for future pecuniary losses, mental anguish and inconvenience. Punitive damages may be available as well, if an employer acted with malice or reckless indifference. You also may be entitled to attorney’s fees.

Charges of national origin discrimination may be filed in person, by mail or by telephone by contacting the nearest EEOC office. Field offices are located in 50 cities throughout the United States and are listed in most local telephone directories under U.S. Government. Information on all EEOC-enforced laws may be obtained by calling toll-free 1-800-669-4000 or 1-800-669-6820 (TDD).

For more information about employment rights and responsibilities under the IRCA, you may contact the U.S. Department of Justice Office of Special Counsel for Immigration Related Unfair Employment Practices at 1-800-255-7688.

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	NOTICE	Number
EEOC		915.002
		Date

1. SUBJECT: Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws.

2. PURPOSE: The purpose of this Enforcement Guidance is to set forth the Equal Employment Opportunity Commission's (EEOC) position regarding remedies available to unauthorized workers in charges filed under federal employment discrimination statutes. This Enforcement Guidance rescinds and supersedes the "Policy Guidance: Effect of the Immigration Reform and Control Act of 1986 (IRCA) on the Remedies Available to Undocumented Aliens Under Title VII," N-915.040 (April 26, 1989).

3. EFFECTIVE DATE: Upon issuance.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, section a (5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Coordination and Guidance Services, Office of Legal Counsel.

6. INSTRUCTIONS: This supersedes the "Policy Guidance: Effect of the Immigration Reform and Control Act of 1986 (IRCA) on the Remedies Available to Undocumented Aliens Under Title VII," N-915.040 (April 26, 1989). Discard the 1989 document and file this as Appendix B of Section 622, Volume II of the Compliance Manual.

7. SUBJECT MATTER: Remedies available to unauthorized workers in employment discrimination cases.

10/22/99
Date

-S-
Ida L. Castro
Chairwoman

DISTRIBUTION: CM Holders

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INTRODUCTION

This Enforcement Guidance addresses the availability of remedies in cases where an employer[1] is found to have discriminated against unauthorized workers[2] in violation of Title VII of the Civil Rights of 1964, the Americans with Disabilities Act (ADA), section 501 of the Rehabilitation Act, the Age Discrimination in Employment Act (ADEA), and the Equal Pay Act (EPA). Based on important legal developments, the Commission is replacing its April 26, 1989, guidance on Title VII remedies for undocumented workers. The Commission now concludes that unauthorized workers who are subjected to unlawful employment discrimination are entitled to the same relief as other victims of discrimination, subject to certain narrow exceptions which are discussed below. The pertinent legal developments include recent cases concerning remedies for unauthorized workers under the National Labor Relations Act, changes in the law regarding after-acquired evidence and mixed motive cases, and the addition of damages to the range of available remedies.

First, the National Labor Relations Board (NLRB) and the Second Circuit recently concluded that unauthorized workers are eligible for back pay under the National Labor Relations Act (NLRA). *A.P.R.A. Fuel Oil Buyers Group*, 320 N.L.R.B. 408, 151 L.R.R.M. 1209 (1995), *aff'd*, *NLRB v. A.P.R.A. Fuel Oil Group*, 134 F.3d 50 (2d Cir. 1997). The *A.P.R.A.* rationale, discussed in more detail below, applies equally to the federal employment discrimination statutes.[3]

Second, in the context of an after-acquired evidence case, the Supreme Court held that employee wrongdoing does not shield a discriminating employer from liability under the civil rights laws.[4] Similarly, Congress amended Title VII to provide that employers are liable when discrimination is part of the reason for an adverse employment action, even if it can show it would have taken the same action absent the discrimination.[5] Both changes recognize that deterrence is a central

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[1] To simplify the discussion, the term "employer" in this document includes not only covered employers but also labor organizations and employment agencies. The principles in the guidance also apply to federal employers.

[2] For purposes of this document, the term "undocumented or unauthorized worker" means, with respect to employment at a particular time, one who is not a citizen or national of the United States and is neither (1) lawfully admitted for permanent residence in the United States, nor (2) authorized by law to work. *See* Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (h)(3); *see also* 8 C.F.R. § 274a.1.

[3] The interpretation of the back pay provision of the NLRA is relevant to Title VII since Title VII's "back pay provision was expressly modeled on the back pay provision of the National Labor Relations Act." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975). The conclusion in the 1989 document, that unauthorized workers who had been discriminatorily terminated or not hired were not entitled to back pay, accorded with the position of the NLRB at that time.

[4] *McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352 (1995).

[5] Section 703(m) of Title VII, 42 U.S.C. § 2000e-2(m).

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goal of the federal employment discrimination laws and that failure to penalize discriminating employers will undermine that goal.

Third, Congress has added compensatory and punitive damages to the range of available remedies under Title VII and the ADA. It did so because it had concluded that existing remedies were ineffective and that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace."[6] Inasmuch as undocumented workers are particularly vulnerable to employer abuse, awarding monetary remedies irrespective of a worker's unauthorized status promotes the goal of deterring unlawful discrimination without undermining the purposes of the immigration laws.

Finally, the ADA had not been enacted when the 1989 document was issued. This guidance highlights the fact that the principles governing remedies for unauthorized workers apply to all of the federal anti-discrimination statutes enforced by the EEOC, including the Rehabilitation Act and the ADA, as well as Title VII, the EPA, and the ADEA.

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6 42 U.S.C. § 1981a, note. *See also* H.Rep. No. 40(I), 102d Cong., 1st Sess. 69, *reprinted in* 1991 U.S.C.C.A.N. 549, 607 ("Making employers liable for all losses – economic and otherwise – which are incurred as a consequence of prohibited discrimination, . . . will serve as a necessary deterrent to future acts of discrimination, both for those held liable for damages as well as the employer community as a whole. . . . Back pay as the exclusive monetary remedy under Title VII has not served as an effective deterrent, and, when back pay is not available . . ., there is simply no deterrent.").

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DISCUSSION

I. Requirements of Immigration Law

Prior to 1986, the immigration laws did not prohibit employers from employing unauthorized workers, although such workers were subject to deportation. In enacting the Immigration Reform and Control Act of 1986 (IRCA), however, Congress made it unlawful for employers to knowingly employ individuals who are not legally authorized to be employed in the United States and who were hired after November 6, 1986.[7]

To address concerns that the employer sanction provisions would cause discrimination against some national origin groups, IRCA prohibits employers that have from four to fourteen employees, and are therefore not covered by Title VII, from discriminating on the basis of national origin against U.S. citizens and nationals and non-citizens with work authorization.[8] It also prohibits citizenship status discrimination and discriminatory documentary practices by all employers who have four or more employees.[9] IRCA's nondiscrimination requirements are enforced by the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), Civil Rights Division, at the U.S. Department of Justice.[10]

II. Coverage of Unauthorized Workers Under Federal Discrimination Laws

The federal discrimination laws protect all employees in the United States, regardless of their citizenship or work eligibility. Employers may no more discriminate against unauthorized

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[7] 8 U.S.C. § 1324a. Criminal penalties can be imposed in cases involving a pattern or practice of knowingly employing unauthorized workers. *Id.* Congress further amended the Immigration and Nationality Act in 1990, imposing civil penalties on individuals who provide fraudulent immigration documents. 8 U.S.C. § 1324c (1994).

[8] 8 U.S.C. § 1324b(a)(1).

[9] 8 U.S.C. § 1324b(a)(1)(B) and § 1324b(a)(6). IRCA's protection against citizenship discrimination applies only to U.S. citizens or nationals, permanent residents, refugees, asylees, and temporary residents. Permanent residents, however, must apply for naturalization within six months of eligibility to remain within the protected class. 8 U.S.C. § 1324b(a)(3). U.S. citizens, nationals, and all individuals with work authorization are also protected by IRCA's prohibition against unfair documentary practices, such as discriminatorily requesting more or different documents than required by 8 U.S.C. § 1324a, or refusing to honor documents that appear genuine. 8 U.S.C. § 1324b(a)(6).

IRCA's nondiscrimination provisions are not directly germane to the remedies issues discussed in this guidance. The references to IRCA in this guidance relate only to the employer sanction provisions.

[10] Charges raising issues under those provisions should be referred to OSC as provided in the Memorandum of Understanding (MOU) between OSC and EEOC. 63 Fed. Reg. 5518 (Feb. 3, 1998).

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workers than they may discriminate against any other employees.[11] EEOC will therefore assure that in its enforcement of the laws, unauthorized workers are protected to the same degree as all other workers.

Recognizing that federal labor laws make no distinction based on alienage, courts have similarly generally held that all workers are protected by those laws, regardless of citizenship or work eligibility.[12]

In the leading case of *Sure-Tan v. NLRB*, 467 U.S. 883 (1984), the Supreme Court addressed the coverage of undocumented workers in the context of the NLRA and explained that affording those workers the protection of American labor laws promotes the purposes of both the labor and immigration laws.

The employer in *Sure-Tan* retaliatorily reported five employees to the Immigration and Naturalization Service (INS) because the employees had exercised NLRA-protected rights. The employer had been aware that the workers were undocumented and had not reported them to the INS until they participated in union activities. It was therefore clear that retaliation was the reason that he had reported them. The Court concluded that applying the labor law to undocumented workers served the purposes of immigration laws:

> [a] primary purpose in restricting immigration is to preserve jobs for American workers . . . . Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for

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11 *See Espinoza v. Farah Mfg. Co.,* 414 U.S. 86 (1973) (Title VII protects non-citizens against race, color, sex, religious, and national origin discrimination)*; EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989) (plaintiffs were subject to Title VII's protections notwithstanding their status as undocumented workers); *Rios v. Enterprise Ass'n Steamfitters Local Union 638 of U. A.*, 860 F.2d 1168, 1173 (2d Cir. 1988) (same). *But see Egbuna v. Time Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998), *cert. denied,* 119 S.Ct. 1034 (1999), in which the court took the contrary view: that an applicant who is unauthorized has no cause of action under Title VII for an allegedly discriminatory refusal to hire. For the reasons discussed in this guidance, the Commission disagrees with the Fourth Circuit.

12 While this conclusion is based in part on the fact that the labor laws protect "any individual," the same rationale applies to the Equal Pay Act, which, although part of the Fair Labor Standards Act (FLSA), refers to "employees" rather than to "any individual." Like Title VII, the FLSA contains no exemption for unauthorized workers. *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988) "[N]othing in IRCA or its legislative history suggests that Congress intended to limit the rights of undocumented . . . [workers] under the FLSA . . . ."), *cert. denied*, 489 U.S. 1011 (1989).

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> undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.

467 U.S. at 893-94. This principle applies equally to the discrimination laws within the Commission's jurisdiction.

Moreover, the EEOC agrees with the NLRB and those courts that have concluded that the *Sure-Tan* decision is unaffected by the subsequent enactment of IRCA. *A.P.R.A.,*151 L.R.R.M. at 1215 ("[C]ongress . . . [in enacting IRCA] expressly approved the view of the Supreme Court in *Sure-Tan* that undocumented workers are entitled to established labor protections."), *aff'd, NLRB v. A.P.R.A.*

Fuel Oil Buyers Group, 134 F.3d 50, 55 (2d Cir. 1997) (NLRA).[13] Failure to protect those workers would undermine enforcement of not only the anti-discrimination laws, but also the immigration laws. Without such coverage, employers have an incentive to hire workers who cannot effectively protest unlawfully discriminatory treatment. As the Eleventh Circuit observed, in the context of the FLSA, "coverage of undocumented workers has a[n effect similar to that of IRCA], in that it offsets what is perhaps the most attractive feature of such workers – their willingness to work [in substandard conditions. Without that offset] . . . employers would have an incentive to hire them."[14]

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13 *See also EEOC v. Switching Systems Div. of Rockwell Int'l Corp.*, 783 F. Supp. 369, 374 (N.D. Ill. 1992) ("Title VII's protections extend to workers who may be in this country either legally or illegally"; however, no Title VII violation because employer's policy discriminated, if at all, only on the basis of citizenship and not national origin) (post-IRCA); *EEOC v. Tortilleria "La Mejor,"* 758 F. Supp. 585, 591 (E.D. Cal. 1991) (same); and *Patel,* 846 F.2d at 704 (FLSA applies to undocumented workers post-IRCA). *But see Egbuna,* 153 F.3d 184 (because IRCA renders unauthorized workers unqualified to work, an unauthorized worker cannot challenge hiring discrimination). *Cf. EEOC v. Hacienda Hotel,* 881 F.2d 1504, 1517 n.11 (9th Cir. 1989) ("although we need not decide the issue in this case [which arose pre-IRCA], it may well be that [IRCA] changes the mix of policy considerations underlying the case law which supports our conclusion that undocumented employees may recover back pay in a Title VII action") (citation omitted).

14 *Patel,* 846 F.2d at 704. *See also A.P.R.A.,* 151 L.R.R.M. at 1215 ("Congress believed that providing . . . [unauthorized workers] the same protections . . . afforded to American employees was the most effective means of eliminating the economic incentives for employers to hire undocumented . . . [workers]"), *aff'd,* 134 F.3d at 56.

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III. Remedies Available to Unauthorized Workers Who Are Victims of Unlawful Discrimination

A. Purposes of Remedies Provisions of Federal Employment Discrimination and Immigration Laws

The remedies provisions of the federal anti-discrimination laws are intended both to deter employment discrimination and to restore the injured employee to the position s/he would have been in absent the discrimination. Some remedies, such as requiring the employer to stop the discriminatory activities, adopt corrective measures, post notices, or expand recruitment, serve primarily to prevent future discrimination. Other remedies, such as instatement, reinstatement, or promotion, serve primarily to make the victim whole.
Monetary remedies serve both purposes: they deter future discrimination[15] and make the victim whole. Back pay is so central to the remedial scheme that the Supreme Court has ruled that, where liability is found, back pay is a presumptive remedy and "should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[16] Compensatory and punitive damages also serve make-whole and deterrence purposes.[17] Moreover, because a private suit serves important public purposes, the litigant will not be denied relief even if s/he has engaged in wrongdoing.[18]

The provisions of the Immigration and Nationality Act (INA) serve a different purpose – the deterrence of illegal immigration. The INS apprehends and removes those who have violated applicable immigration laws and imposes sanctions on employers who knowingly employ unauthorized workers hired after November 6, 1986. The purposes and remedial schemes of immigration and discrimination laws are not at odds with each other. Thus, where an unauthorized worker is found to have been a victim of employment discrimination, remedy

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> 15 If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a [monetary] award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'

Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (citation omitted).

16 *Id.* at 421.

17 For detailed information on appropriate compensatory and punitive damage awards under Title VII and the ADA, see "Enforcement Guidance on Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991," EEOC Compliance Manual (BNA) N:6071, 6076 (July 14, 1992). Liquidated damages are available for violations of the Equal Pay Act and for willful violations of the ADEA and track the amount of the back pay award. *See* Section 7(b) of the ADEA, 29 U.S.C. § 626(b), and Section 16(b) of the FLSA, 29 U.S.C. § 216(b).

18 *McKennon,* 513 U.S. at 358, citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).

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awards can and should fulfill the goals of the employment discrimination statutes without undermining the purposes of the immigration laws.

B. Availability of Remedies for Unauthorized Workers

1. Injunctive Relief to Prevent Future Discrimination

Remedies that serve only to prevent future discrimination are unaffected by the immigration laws and remain available to redress violations of the employment discrimination laws without regard to an employee's work status. Such injunctive relief may include, for example, orders to post notices that the employer has been found to have discriminated, orders to stop the discriminatory practices, orders to purge personnel records of information regarding discriminatory actions, and orders to adopt some specific corrective action, such as implementing new hiring procedures, keeping data on all disciplinary actions, or providing training.

2. Instatement or Reinstatement

Under federal employment discrimination laws, victims of discriminatory refusal to hire or discriminatory termination are presumptively entitled to instatement or reinstatement.[19] The Commission concludes that the same presumption applies to unauthorized workers who were hired on or before November 6, 1986 because IRCA does not prohibit employers from continuing to employ workers hired on or before that date.[20] This presumption also applies to workers hired after November 6, 1986 unless the employer knows that the worker is unauthorized, in which case the worker's eligibility for reinstatement depends on being able to satisfy IRCA's verification requirements within a reasonable time.[21]

The *Sure-Tan* Court held that unauthorized workers are protected by the NLRA and remanded the case to the Board to determine what remedies were appropriate in light of the fact that the workers had left the country and it was not clear whether they had returned.[22] The Court placed

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19 *See, e.g., Roush v. KFC Nat'l Management Co.,* 10 F.3d 392, 398 (6th Cir. 1993), *cert. denied,* 513 U.S. 808 (1994) (ADEA); *Duke v. Uniroyal, Inc.,* 928 F.2d 1413, 1424 (4th Cir.), *cert. denied,* 502 U.S. 963 (1991) (ADEA); *Henry v. Lennox Indus., Inc,* 768 F.2d 746, 752 (6th Cir. 1985) (Title VII). Of course, the presumption can be overcome. For example, the employer may be able to show that the employee would not have gotten the job even absent the discrimination.

20 INS regulations provide that such workers are "grandfathered" and not subject to IRCA's employment verification requirements. 8 C.F.R. § 274a.7(a). The regulations further provide that wrongful termination followed by reinstatement should not be considered a break in service sufficient to cost those workers their "grandfathered" status. 8 C.F.R. § 274a.2(b)(1)(viii)(5).

21 Except in this very narrow circumstance, employers may not request or reexamine I-9 documents of workers returning from a discriminatory discharge. 8 U.S.C. § 1324b(a)(6); 8 C.F.R. § 274a.2(b)(1)(viii).

22 *Sure-Tan*, 467 U.S. at 904-06. INS permitted the *Sure-Tan* plaintiffs to leave the country voluntarily in lieu of deportation, and they did so immediately.

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only one constraint on the remedies the Board could order; namely, any offer of reinstatement was to be conditioned on the workers' lawful reentry. The Court imposed that restriction to avoid encouraging illegal reentry and thereby undermining the purpose of the immigration law.[23] In so doing, the Court made clear that the workers' original illegal entry did not preclude reinstatement or back pay.

At the time *Sure-Tan* was decided, employers were not prohibited from employing unauthorized workers. In *A.P.R.A.,* the Second Circuit considered whether, by enacting IRCA to make employing unauthorized workers illegal, Congress altered the *Sure-Tan* rule that unauthorized workers were entitled to relief.

As in *Sure-Tan*, the *A.P.R.A.* employer knowingly employed unauthorized workers and retaliated against them for participating in union activity. In *A.P.R.A.*, however, the workers had remained in the United States until the time of the decision. The Board concluded that "if full remedies are not granted, the illegitimate economic advantage to unscrupulous employers that knowingly employ undocumented workers has [a] . . . corrosive effect on congressional policies respecting the workplace . . . ."[24] To avoid a conflict with IRCA's prohibition against employing unauthorized workers, the Board ordered that the offer of reinstatement be conditioned on the workers' ability, within a reasonable period of time, to satisfy IRCA's normal verification of work eligibility requirements. In affirming the Board's order of conditional reinstatement, the Second Circuit explained that the Board "quite clearly tailor[ed] the remedy for the violation of the NLRA to the restrictions of" IRCA.[25] In addition, the court observed that the Board's remedy, "felicitously keeps the Board out of the process of determining an employee's immigration status, leaving compliance with IRCA to the private parties to whom the law applies.... the Board is not charged with the enforcement of the complex U.S. immigration laws."[26]

Like the Board, the EEOC is not charged with the enforcement of IRCA and should not participate in "the process of determining an employee's immigration status." Therefore, EEOC will neither collect nor evaluate evidence regarding a worker's status.

3. Back Pay and Damages

Unauthorized workers are entitled to back pay and appropriate damages on the same basis as other workers, unless the award would conflict with the purposes of the immigration laws. In the great majority of instances, monetary awards do not conflict with the purposes of immigration laws, but enhance them. Without monetary awards, including damages, employers who are unscrupulous may consider penalties under immigration law to be offset by the savings

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23 *Id.*

24 *A.P.R.A.*, 151 L.R.R.M. at 1216.

25 *A.P.R.A.*, 134 F.3d 50, 57.

26 *Id*.

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of employing unauthorized workers, thus defeating the objectives of immigration, civil rights, and labor laws and allowing employers to profit from their own wrongdoing.[27]

There are no limitations on damages for unauthorized workers, beyond those which would apply in any other case. However, there is a narrow limitation on the availability of back pay. To fulfill the requirements of the immigration laws, the *Sure-Tan* Court ruled that "in computing back pay, the employees must be deemed unavailable for work (and the accrual of back pay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."[28] The Commission construes this language to limit back pay relief only where, as in *Sure- Tan,* the worker is unavailable for work by virtue of being out of the country.[29]

The Commission adopts this interpretation for several reasons. The Supreme Court, in *Sure-Tan,* did not hold that the employees' original unlawful entry precluded awards of reinstatement or back pay. Its reversal of the appellate court's award of six months back pay was, instead, because it regarded as unduly speculative the appellate court's surmise that, absent the unlawful

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> [27] Granting unlawful workers full redress for violations . . . should act as a deterrent to such unprincipled and opportunistic employers, and level the competitive playing field between them and the vast majority of employers in the United States that recognize and respect the rights of their employees and that carefully follow the procedures that IRCA requires.

*A.P.R.A.,*151 L.R.R.M. at 1216, *aff'd,* 134 F.3d at 56. *See also Patel,* 846 F.2d at 704-05 (FLSA).

[28] 467 U.S. at 903.

[29] The Second and Ninth Circuits support this position. *A.P.R.A.,* 134 F.3d at 54 (post-IRCA); *Rios,* 860 F.2d. 1168 (2d Cir. 1988) (pre-IRCA); *Local 512, Warehouse and Office Workers' Union v. NLRB,* 795 F.2d 705 (9th Cir. 1986) (pre-IRCA).

The Seventh Circuit took a contrary position in *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992), holding that *Sure-Tan* prohibits awards of back pay to undocumented workers under the NLRA. However, in his dissent, Judge Cudahy noted that the Supreme Court's reference to employees being "lawfully entitled to be present and employed in the United States," was a quote from the decision that he wrote for the Circuit in *Sure-Tan*, and that he was referring to workers who were not in the country and could not legally return. *Id.* at 1123-24. Moreover, the Seventh Circuit explicitly declined to decide whether the same rule would apply to Title VII. *Id.* at 1122 n.7. That rule should not apply to Title VII, the ADA, or the ADEA because part of the court's rationale was that "the award provisions of the NLRA are remedial, not punitive, in nature." *Id.* at 1119. In contrast, Title VII, the ADA, and the ADEA provide for punitive damages (ADEA liquidated damages are punitive in nature), and back pay under those statutes serves not only a remedial, but also a deterrent function. *See Albemarle Paper Co. v. Moody,* 422 U.S. at 418-19, 421.

The Commission is persuaded that Judge Cudahy's dissent and the decisions of the Second and Ninth Circuit are more soundly reasoned and more consistent with the language and purposes of the employment discrimination laws.

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retaliation, the workers would have worked for another six months.[30] In addition, " *Sure-Tan* gave no indication that it was overruling a significant line of [NLRB] precedent that disregards a discriminatee's *legal status*, as opposed to *availability for work*, in determining his or her eligibility for back pay."[31]

The Commission concludes that IRCA does not preclude awarding back pay and damages to unauthorized workers because, as the Second Circuit has observed,

> [while] IRCA established sanctions for employers who knowingly hire or continue to employ illegal aliens, . . . and also introduced procedures to assure that undocumented workers are not able to gain employment in the United States, . . . IRCA does not materially change the policy considerations underlying the previous decisions . . . . The primary purpose of IRCA was to make it more difficult to employ undocumented workers and to punish the employers who offer jobs to these workers . . . . Congress sought to reduce the availability of jobs for undocumented workers without adversely affecting working conditions within those jobs.

A.P.R.A., 134 F.3d at 55.[32]

Significantly, the conclusion that employers must make monetary awards to victims of discrimination despite lack of work authorization comports with the rules governing cases in which the employer is guilty of discrimination but the employee is also guilty of wrongful acts that would have motivated the employer to terminate the employment relationship. The

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30 *Sure-Tan,* 467 U.S. at 900-01.

31 *See A.P.R.A.,* 134 F.3d at 54, citing *Local 512,* 795 F.2d 705, 717 (9th Cir. 1986) (emphasis added).

32 This conclusion is supported by IRCA's legislative history. The report of the House Education and Labor Committee on IRCA stated, *inter alia*, the following:

> [t]he committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the . . . Equal Employment Opportunity Commission . . . to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.

H.R. Rep. No. 99-682(II), 99th Cong., 2d Sess. 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758. *See also A.P.R.A.*, 134 F.3d at 56 n.3.

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governing principle is that, because monetary remedies serve not only remedial but also deterrence purposes, employee wrongdoing does not bar relief.[33]

In short, employers who discriminate against unauthorized workers are liable for monetary relief, including compensatory, punitive, or liquidated damages, to the same extent as for authorized workers. An employer is not liable for back pay accruing during any period during which the worker is unavailable for work because s/he is out of the country.[34] In addition, back pay will stop accruing if the worker is reinstated, or, within a reasonable period of time after being offered instatement or reinstatement,[35] the worker cannot show work eligibility.

4. Remedies for Discrimination in the Terms and Conditions of Employment or For Failure to Promote

The undocumented status of workers is never a justification for subjecting them to discriminatory terms or conditions of employment or for failing to promote them. Thus, for example, workers who have been discriminatorily undercompensated or harassed while working are entitled to all appropriate relief, including full back pay, for the period worked, even if they have subsequently left the country. They were clearly "available" for work for periods during which they were actually working.

5. Remedies in Cases of Retaliation

Unauthorized workers are particularly vulnerable to threats to report them to INS. If such a threat or report is made because a worker opposed unlawful discrimination or participated in a proceeding under the anti-discrimination laws, it constitutes unlawful retaliation. In every case in which the employer asserts that the worker is unauthorized and appears to have acquired that information after that worker complained of discrimination, EEOC will determine whether the information was acquired through a retaliatory investigation.[36] If the investigation was retaliatory, the employer is liable for monetary damages for retaliation without regard to the worker's actual work status as well as for appropriate equitable relief.

6. Attorneys' Fees and Costs

Attorneys' fees and costs are available to unauthorized workers on the same terms as to other workers who are prevailing parties under laws enforced by the Commission.[37] Attorneys' fees

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[33] *McKennon,* 513 U.S. at 357.

[34] Following the dictate of *Sure-Tan*, a monetary award should not induce illegal reentry. Thus, if the worker's location is known, the monetary award should be sent to him/her.

[35] An offer of reinstatement must comport with the standards set forth in *EEOC v. Ford Motor Co.*, 458 U.S. 219 (1982).

[36] *See EEOC Enforcement Guidance: After Acquired Evidence,* 8 FEP Manual 405:7331, 7335 (Dec. 14, 1995).

[37] *See* Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k); Section 16(b) of the FLSA (EPA), 29 U.S.C. § 216(b); Section 7(b) of the ADEA, 29 U.S.C. § 626(b); and Section 505 of the ADA, 42 U.S.C. § 12206.

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and costs are available in mixed motives cases, even though reinstatement, back pay, and damages are not.[38]

C. Limitations on Remedies: Mixed Motive and After-Acquired Evidence Analysis

As in any discrimination case, an employer may be able to limit the remedies available for its discriminatory acts if it can prove that it acted from mixed motives, *i.e.*, that it would have taken the same action even absent the discrimination,[39] or that, after the discriminatory act, it acquired evidence that would have caused it to take the same adverse action.[40] A worker's unauthorized status can be a legitimate reason that may form the basis for a mixed motive or after-acquired evidence defense and thereby limit the available remedies.

In mixed motive cases, the employer can be liable for attorneys' fees and injunctive relief, but the complaining party is not entitled to reinstatement, back pay, or any damages.[41] In after-acquired evidence cases, if the employer can show that it would not have employed the person after learning of his or her unauthorized status, the worker would not typically be entitled to reinstatement and the period during which back pay accrues would be cut off as of the date that the employer discovered the unauthorized status.[42] Punitive damages and damages for emotional harm would be unaffected by the after-acquired evidence.[43]

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38 *See* Sections 706(g)(2)(B)(i) and (ii) of Title VII, 42 U.S.C. §§ 2000e-5(g)(2)(B)(i),(ii).

39 *See* Section 703(m) of Title VII, 42 U.S.C. § 2000e-2(m) (liability is established when the complaining party proves that a prohibited factor motivated the adverse action, even though other factors also motivated the action).

40 *See McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352, 361-62 (1995) (the fact that the employer could have terminated the employee for misconduct is irrelevant to liability if the employer was not motivated by such misconduct; only the remedy is affected). *See also EEOC Enforcement Guidance: After-Acquired Evidence*, 8 FEP Manual 405:7331 (Dec. 14, 1995).

41 Section 706(g)(2)(B)(ii) of Title VII, 42 U.S.C. § 2000e-5(g)(2)(B)(ii).

42 *McKennon,* 513 U.S. at 360 (if employer can prove that it would have terminated the employee when it learned of specific misconduct, it need not reinstate her and the back pay period will end on the date that the employer discovered the evidence).

43 *See EEOC Enforcement Guidance: After-Acquired Evidence,* 8 FEP Manual 405:7331, 7333-37 (Dec. 14, 1995) (explaining effect of after-acquired evidence on back pay and damages).

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Labor Condition Application and H-1B Visa Petition

This Memorandum will review the necessary procedures to obtain H-1B work authorization for a foreign worker. The H-1B process involves two steps. First, the employer submits a Labor Condition Application ("LCA") to the Department of Labor ("DOL") for certification. Second, the employer files a petition with the Immigration and Naturalization Service ("INS") to obtain H-1B classification for the alien. If the alien is already in the U.S. in another status, an application for change of status can be simultaneously with the petition. If the alien is in the U.S. in H-1B status working for another employer, a change of employer/extension of stay application is filed simultaneously with the petition.

I. Filing the LCA

By filing the LCA with DOL, the company is attesting to the following:

1. That for the entire period of authorized employment (typically, three years), the company will pay all H-1B alien(s) who have similar experience and qualifications for the specific position set forth in the LCA at least the higher of:

   a. the **actual** wage level paid by the company to all other individuals with similar experience and qualifications for the specific position in question; or

   b. the **prevailing** wage level for that specific occupational classification by all employers in the geographic area of intended employment. We will assist you in determining the prevailing wage for the position. DOL will accept a State Employment Service Agency (SESA) wage determination as *per se* correct and will not investigate a prevailing wage complaint where there is such a determination.

   Note that an employer may not put H-1B worker on unpaid status due to lack of work or other employer-related reasons. *Unpaid leave* IS permissible if the leave is *unrelated to employment* (e.g., maternity leave, time off to care for sick family member, etc.) and U.S. workers would not be paid under similar circumstances.

2. That for the entire period of authorized employment, the employment of the H-1B alien will not adversely affect the working conditions of workers similarly employed in the area of intended employment.

3. That on the date the LCA is signed and submitted, there was not a strike, lockout, or work stoppage in the course of a labor dispute in the relevant occupation at the place of employment, and if such a strike occurs, the employer will notify DOL within three days.

4. That on or before the date of the LCA, notice of the application was posted in two conspicuous locations in at the work site. If a collective bargaining agreement

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applies to the position, notice must be provided to the collective bargaining representative in lieu of posting. **(Electronic Posting is persmissable if . . . . Posting at client sites is required . . .)**

In addition, copy of the LCA certified by DOL must also be provided directly to the alien prior to beginning the H-1B employment.

Please note that there are additional attestations and requirements that "H-1B dependent" employers must comply with. **(ADD information about recruitment and no displacement attestation)** An "H-1B dependent" employer is generally one that has a high percentage of H-1B employees. Please let us know immediately if 15% or more of the workforce at your company are H-1B employees.

In addition, note that if the company has on site contract workers who are employed by an "H-1B dependent" employer, the employer of these contractors may request assurance from your company that your company has not laid off workers 90 days prior to the worker being on your company's worksite, and your company does not intend to lay off workers within 90 days after the worker is on your worksite. Thus, lay offs at your company may affect your ability to keep contract employees of H-1B dependent employers on your worksite.

The LCA procedure is primarily complaint-driven; that is, an investigation into the accuracy of the LCA will normally occur only if an aggrieved party files a complaint. If a complaint is filed, the DOL Wage and Hour Administrator will investigate, and in the event of a violation of the LCA, the Administrator may (1) impose a $1,000 fine per violation; (2) bar the employer from obtaining future visas for a period of at least one year; and (3) order the employer to provide for payment of back wages. Material misrepresentation on the LCA can also subject the signer to penalties for perjury including fines and incarceration.

II. Satisfying Documentation Requirements

Within one working day of the filing of the LCA, upon request by any person, the company must make available for inspection certain documentation about the LCA. We will prepare a "Public Access" folder for the company to keep for this purpose. This folder must be retained for one year beyond the end of the period of employment specified on the LCA.

In addition to the public access documentation, the company must maintain certain records for DOL to review in the event of a complaint. The company must maintain payroll records for the alien and any other individuals with experience and qualifications similar to those of the alien's who are in the same position at the place of employment. The company must maintain the payroll records for a period of three years from the date of the creation of the records. **(List docs)**

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III. The H-1B Petition

Once the LCA has been certified, we will complete and file the H-1B petition with INS. The INS filing fee for the petition is $110, plus an additional $1,000 that will go to a "training fund" for U.S. workers. The alien may not pay the $1,000 fee. The petition will consist of the Form I-129H, a company letter of support outlining the proposed position duties and requirements, and supporting documentation including information about the company. It typically takes two to four months for INS to approve the petition.

H-1B nonimmigrant visa classification has two major requirements: (1) that the position to be filled is a "specialty occupation," i.e., an occupation requiring the theoretical and practical application of a highly specialized body of knowledge, and for which attainment of a U.S. bachelor's degree or higher is a minimum requirement for entry into the occupation, and (2) that the alien possesses a U.S. bachelor's degree or higher in the specialized field. (Note that if the individual does not have a degree, or possesses a foreign degree, an education and/or experience evaluation will be required to determine the equivalence to a U.S. degree.)

If the petition is requesting a change of employer for an individual already in H classification, the employee may begin working for the new employer upon filing of the new employer's H petition if the employee was lawfully admitted into the U.S., has not worked without authorization since last entry, and the petition is filed before expiration of the employee's authorized stay.

For petitions requesting a change of status from another nonimmigrant classification, the company may begin to employ the alien in H-1B classification once the petition is approved. If the alien is outside the U.S., he or she will need to obtain an H-1B visa stamp at a U.S. Embassy or Consular Post abroad in order the enter the United States. Similarly, if the alien is in the U.S. but then travels internationally he or she will likely need to obtain an H-1B visa stamp prior to reentering the United States. Please contact us if you would like assistance with the H-1B visa stamp application.

The employer must begin to pay H-1B employee when he/she "enters into employment", i.e., when he/she is available to work and comes under control of employer, and in no event later than 30 days after the employee enters U.S. under the approved H-1B, or if in the U.S., 60 days after the start date on the H-1B petition or date of change of status by INS, whichever is later.
Under current regulations, in the event the company dismisses the alien from employment before the end of the period of authorized admission, the company is expected to accept liability for the reasonable costs of return transportation to his or her residence abroad.

The LCA, H-1B petition, and prevailing wage information are valid for three years. The company should docket 30 months from the date of certification of the LCA to decide if the company would like to obtain an extension of the LCA and H-1B petition for an additional three years. (We will also docket this date.)

Please notify us regarding any changes in wages, working conditions, job site, or characteristics of the employment position, or if the alien changes jobs. Likewise, please notify us if there are

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any changes in the corporate structure or ownership of the company or if any kind of labor dispute occurs. Such changes can affect both the LCA and the H-1B petition, which both refer to a specific job and to a specific person.

* * * *

We look forward to assisting in the above process. If you have any questions about any of the above, please do not hesitate to contact us.

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I-9 Form with Symbols

U.S. Department of Justice
Immigration and Naturalization Service

OMB No. 1115-0136
Employment Eligibility Verification

Please read instructions carefully before completing this form. The instructions must be available during completion of this form. ANTI-DISCRIMINATION NOTICE. It is illegal to discriminate against work eligible individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification.

Print Name: Last / First / Middle Initial	Maiden Name
1a	
Address (Street Name and Number) / Apt. #	Date of Birth (month/day/year)
1d	1b
City / State / Zip Code	Social Security #
1d	1e

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following): 2a
- ☐ A citizen or national of the United States
- ☐ A Lawful Permanent Resident (Alien # A 2b
- ☐ An alien authorized to work until __/__/__ 2c, 2d (Alien # or Admission #)

Employee's Signature	Date (month/day/year)
3a	3b, 3c

Preparer and/or Translator Certification.

Preparer's/Translator's Signature	Print Name
4a	4b
Address (Street Name and Number, City, State, Zip Code)	Date (month/day/year)
4c	4d

Section 2. Employer Review and Verification.

	List A	OR	List B	AND	List C
10a Document title:	3a, 3b		6a, 6b		7a, 7b
10b Issuing authority:	3f		6h		7h
10c Document #:	5c, 5d		6c, 6d, 6f		7c, 7d
Expiration Date (if any):	__/__/5e		__/__/6e, 6g		__/__/7e, 7f, 7g
Document #:					
Expiration Date (if any):	5g, 5h, 5i				

CERTIFICATION - I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) __/8i/__ and that to the best of my knowledge the employee is eligible to work in the United States. (State employment agencies may omit the date the employee began employment).

Signature of Employer or Authorized Representative	Print Name	Title
8a, 8b	8c	8d
Business or Organization Name	Address (Street Name and Number, City, State, Zip Code)	Date (month/day/year)
8e	8f	8g, 8h

Section 3. Updating and Reverification. To be completed and signed by employer

A. New Name (if applicable)	B. Date of rehire (month/day/year) (if applicable)
9a	9k

9d C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment eligibility.

Document Title: 9a Document #: 9f Expiration Date (if any): __/__/9g

I attest, under penalty of perjury, that to the best of my knowledge, this employee is eligible to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative	Date (month/day/year)
9h, 9j	9b, 9c, 9i

Form I-9 (Rev. 11-21-91) N

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ON-CAMPUS RECRUITMENT IN LIGHT OF IRCA: WHAT QUESTIONS CAN AND CANNOT BE ASKED

By

Cynthia Juarez Lange[1]

I. INTRODUCTION

Each year, company recruiters flock to college campuses around the country seeking to find the best and the brightest candidates. While balancing the company's interest in exploring each candidate's background with the myriad of State and Federal discrimination laws, recruiters are often confused about what questions they can and can't ask. Additionally, immigration requirements and export control concerns complicate this process. In light of the employer sanctions and antidiscrimination provisions of the Immigration Reform and Control Act of 1986[2] (IRCA), employers must ensure that both on-campus recruiters as well as personnel administrators at company sites are complying with all of IRCA's provisions in the hiring process.

This article provides an outline of IRCA's antidiscrimination provisions and offers practical pointers for complying with IRCA in the recruitment process.

---

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[2] Pub. L. No. 99-603, 100 Stat. 3359, 3360, 3374 (codified as amended in §274A, 8 U.S.C. 1324a and §274B, 8 U.S.C. 1324b)(hereinafter IRCA).

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II. BACKGROUND

Congress enlisted employers in the effort to control illegal immigration when it passed the Immigration Reform and Control Act of 1986[3]. IRCA requires employers to verify employment eligibility of all persons hired after November 6, 1986, by completing an I-9 form[4]. Under IRCA's employer sanctions provisions, employers can be penalized for: (1) "knowingly" hiring or continuing to employ unauthorized workers[5] ($250 to $10,000); and (2) "paperwork" violations of IRCA's requirements relating to verifying employment eligibility[6], which includes incorrectly completing, or failing to complete or maintain I-9 forms ($100 to $1000 per violation).

Due to concerns that employers might be hesitant to hire individuals who look or sound foreign, IRCA also prohibits discrimination on the basis of national origin or citizenship status[7]. These antidiscrimination provisions were enacted ostensibly to provide relief for employees and prospective employees who are authorized to work in the U.S., but who may be discriminated against because of their ancestry. In addition, the antidiscrimination provisions were designed to fill in the gaps left by the antidiscrimination provisions contained in Title VII of the Civil Rights Act of 1964, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC).[8]

IRCA primarily prohibits three types of discriminatory practices in the context of hiring, recruiting, referring for a fee or discharging:

1. National Origin Discrimination

   Protection from national origin discrimination extends to all citizens and "work-authorized" aliens (i.e. permanent residents, nonimmigrants and other persons who are authorized to work in the U.S.).[9] IRCA's national origin discrimination

[3] *Id.*

[4] §274A, 8 U.S.C. 1324a.

[5] §274(a)(1)(A) and §274(a)(2), 8 U.S.C. 1324a.

[6] §274A(b), 8 U.S.C. 1324a.

[7] §274B(a), 8 U.S.C. 1324b.

[8] 42 U.S.C. §2000e *et seq.*, as amended (hereinafter Title VII).

[9] §274B(a), 8 U.S.C. 1324b.

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provisions effectively extend only to employers of four to fourteen employees.[10] In contrast, Title VII relates to employers of fifteen or more employees, and protects all individuals from national origin discrimination, regardless of their immigration status.[11] (Additionally, Title VII goes beyond "hiring, recruiting, referring for a fee or discharging," and protects against national origin discrimination in promotions, discipline, harassment, and other terms, conditions and privileges of employment.)

2. Citizenship Status Discrimination

Under IRCA's citizenship status discrimination provisions, the classes of "protected individuals" includes:

- U.S. citizens and Nationals
- Permanent resident aliens
- Temporary residents (i.e. persons legalized under IRCA's amnesty or special agricultural worker programs)
- Refugees
- Asylees.[12]

Employers may not discriminate in hiring or firing against any of the 5 groups of people. IRCA's citizenship status antidiscrimination provisions relate to all employers of four or more employees.[13] Prohibitions against citizenship status discrimination were not included in Title VII.

3. Document Abuse

All citizens and work-authorized aliens are protected from "document abuse,"[14] i.e. when an employer requests to examine more or different documents from an individual during the I-9 procedure or refuses to accept proper documents[15].

[10] *Id.*

[11] See, *supra* note 9.

[12] *Id.*

[13] *Id.*

[14] §274B(a)(6), 8 U.S.C. 1324b.

[15] As the subject matter of this article primarily addresses recruitment, which should occur prior to the point where an I-9 is completed, document abuse discrimination is not addressed in great detail herein.

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The Office of the Special Counsel for Immigration-Related Unfair Employment Practices (OSC) is responsible for investigation, issuance and prosecution of complaints relating to IRCA's antidiscrimination provisions.[16] Individuals are also granted the right to file a claim directly with an Administrative Law Judge if OSC does not file a charge within 120 days of receipt of an individual's complaint.[17]

Employers are subject to substantial penalties for violations of IRCA's antidiscrimination provisions.[18] For a first offense of national origin or citizenship status discrimination, civil fines may be assessed ranging from $250 to $2,000 for each worker or job applicant.[19] For a second offense, civil fines may range from $2,000 to $5,000 for each worker or job applicant. For the third offense and subsequent offenses, employers may be subject to a fine of $3,000 to $10,000 for each worker or applicant discriminated against.[20] Other penalties may be imposed including backpay awards and attorneys fees.[21]

III. CONDUCTING ON-CAMPUS RECRUITMENT IN LIGHT OF IRCA

During the recruitment process, citizenship status and national origin discrimination concerns can be triggered in a number of situations. One clear example is where an employer either advises a job applicant or has a company policy that it will only hire U.S. citizens[22] or permanent residents[23]. The practice of singling out only one or two groups in the protected class for special treatment in hiring or firing violates the prohibition against citizenship status discrimination. All groups in the protected class must be treated equally unless required by law, regulation, executive order, or government contract. Numerous companies have run afoul of this

[16] §274B(d)(1), 8 U.S.C. 1324b.

[17] §274B(d)(2), 8 U.S.C. 1324b.

[18] §274B(g)(2)(B), 8 U.S.C. 1324b.

[19] *Id.*

[20] *Id.*

[21] *Id.*; §274B(h), 8 U.S.C. 1324b.

[22] U.S. citizen-only hiring restrictions generally will be found to violate IRCA. However, a statutory exception, which is narrowly construed by OSC, allows such citizen-only restrictions to the extent they relate to a particular employment position when the discrimination is required to comply with law, regulation or executive order, or is required by a federal, state or local government contract. §274B(2), 8 U.S.C. 1324b. Additionally, the statute allows employers to prefer a U.S. Citizen over another member of the protected class if both candidates are "equally qualified".

[23] Note that the reverse is also true, i.e. citizenship status discrimination claims may be brought by U.S. citizens claiming that an employer hired aliens (such as through the labor certification process) in preference to available U.S. workers. This is commonly referred to as "reverse discrimination". See *United States v. McDonnell Douglas*, 2 OCAHO 351 (7/2/91).

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provision since IRCA's passage. The OSC has investigated thousands cases against companies allegedly engaged in this type of practice.

Less clear, however, is the myriad of questions and responses a company recruiter may state in an on-campus interview that could discriminate based on citizenship status or national origin. Such questions or responses potentially expose the employer to charges of impermissible discrimination by OSC and rejected job applicants.

Under IRCA, employers are not required to consider for employment persons who do not already have work authorization, such as foreign students in F-1 status who are graduating from college. Employers may, however, decide to consider such applicants. Regardless of whether an employer decides to consider or not to consider such applicants, they must do so consistently, so as to avoid violating the antidiscrimination provisions. For example, if an employer sponsors one individual for an H-1B visa and then refuses to consider other applicants for H-1B visas, such actions could, depending on the facts and circumstances, raise national origin discrimination issues. Thus, employers should implement consistent policies and procedures with respect to these situations and ensure the policies are being applied consistently.

Employers that wish to implement limited hiring policies or on-campus recruitment criteria must consider the legal and practical implications of doing so. For example, some employers may want to direct their recruitment activities only to those candidates who are within the class of "protected" individuals for citizenship-status discrimination purposes. This type of recruitment criteria, while it is permissible under IRCA's citizenship status discrimination provisions, should also be evaluated in light of the potential disparate impact on certain national origin groups in violation of Title VII of the Civil Rights Act of 1964[24].

There are several pre-employment inquiry approaches companies may wish to consider to determine which students fall within the parameters of their limited hiring policies or recruitment criteria.

Under the most conservative approach, which has been suggested by both OSC and the Equal Employment Opportunity Commission (EEOC) as protecting employers from potential allegations of discrimination, an employer would ask:

Are you legally authorized to work in the United States on a full-time basis?

____ Yes _____ No

---

[24] Given that Title VII prohibits hiring policies that have a disparate "impact" as well as a disparate intent, labor counsel in light of Title VII should evaluate all restrictive hiring policies.

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If the applicant checks "Yes," the employer should not inquire further regarding the basis for employment eligibility. If the applicant checks "No," the employer has two choices. It may either inquire further, if its policy contemplates hiring persons without current employment authorization. Alternatively, since persons who answer "No" are not protected from discrimination under IRCA, the employer is not required to further consider such persons for employment.

The primary concern with this approach is that it does not allow an employer to evaluate whether a candidate has work authorization, which will expire shortly, or whether the candidate is only authorized for a specific employer. Thus, the OSC/EEOC preferred approach should be evaluated based on the legitimate need of the employer to distinguish between individuals who are temporarily authorized to work and those who have more permanent authorization.

Another approach, which has not been endorsed by OSC or EEOC, allows an employer to distinguish between candidates in the "protected" class, i.e. protected from citizenship discrimination, from those who have only temporary work authorization or no work authorization at all. Using this approach an employer would ask:

(1) Are you a U.S. citizen, Permanent Resident, Temporary Resident, Asylee or Refugee?

YES________ NO________

(2) If not, do you have the legal right to work in the U.S.?

YES________ NO________

If yes, to question (2), please explain: ________________________
____

If the answer to question 1 is "Yes", employers should not inquire further regarding work authorization or immigration status, including inquiries as to which category the person belongs, as this could be construed to be discriminatory. If the applicant answers "Yes" to question 2, the immigration laws do not prohibit the company from asking the specific basis of work authorization and its duration. However, extreme caution should be taken not to inquire, intentionally or inadvertently, as to the applicant's citizenship or nationality, as this could be viewed as national origin discrimination. Employers should decide which approach best suits their administrative needs yet still provides protection from allegations of discrimination.

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A third approach was recently endorsed by OSC. Using this approach employers would ask:

1. Are you legally authorized to work in the United States?
   yes ____ no _____

2. Will you now or in the future require sponsorship for employment visa status (e.g., H-1B visa status?)
   yes ____ no _____

This approach is more direct and can be less confusing. Each employer must balance its need to plan ahead with the possibility of discrimination.

Some employers have legitimate business reasons for wanting to deter students who have only short-term or employer-specific employment authorization from signing-up for campus interviews. For example, the company may have made a business decision that it is not willing to expend the costs and time required to train persons who will only be authorized to work for a limited period of time. Employers should be cautioned, however, that refusing to hire an individual because of a future expiration date could be viewed by OSC to be a violation of IRCA's antidiscrimination provisions.

An important practical issue employers may wish to consider is the "loose cannon" factor, i.e. the risk that if company recruiters are allowed to ask the pre-employment questions of the candidates, the company recruiters may also independently decide to ask questions which could lead to charges of IRCA violations. For this reason, many employers prefer to have a written employment questionnaire which contains the pre-employment questions. In addition, employers should caution their recruiters to follow the following questioning guidelines:

- Do not ask students regarding their visa type.
- Do not ask about an individual category, e.g. "Are you a U.S. citizen?" or "Are you a Permanent Resident?"
- Do not ask questions relating to the nationality, lineage, ancestry, national origin or parentage of students, their spouses or parents.
- Do not ask questions about students' first language, mother/native tongue.
- Do not ask students how they acquired the ability to read, write or speak a foreign language.
- Do not ask students to produce documents prior to employment that evidence employment authorization.

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IV. CONCLUSION

Government enforcement of IRCA has increased significantly within the last few years. This area of the law is highly complex and continues to evolve through regulation and case law. In light of the potential for liability in this area, employers who conduct recruitment on college campuses must be cautious to avoid IRCA violations in the recruitment process. In addition, employers are strongly encouraged to evaluate their recruitment practices and conduct IRCA-related training of their college recruiters to ensure compliance with the law.

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KEY TO SYMBOLS

INS FORM I-9

SECTION 1 : EMPLOYEE INFORMATION AND VERIFICATION

Employee Information:

1a - Name stated incorrectly
1b - Date of birth missing or incorrectly stated
1c - Social security number missing or incorrectly stated
1d - Address missing or incorrectly stated

Citizenship/Immigration Status:

2a - Status is not indicated or is incorrectly identified
2b - If employee is a permanent resident, the alien registration number is missing or incorrectly stated
2c - If employee is not a permanent resident but has authorization to work in the United States, the Alien number or admission number is missing or incorrectly stated
2d - Expiration date of employment authorization missing or incorrectly stated

Employee's Attestation:

3a - Employee's signature missing
3b - Date of employee's execution of form missing or incorrectly stated
3c - Form not signed on date of hire

Preparer/Translator Certification:

4a - Signature of Preparer/Translator missing
4b - Name of Preparer/Translator missing or incorrectly stated
4c - Address of Preparer/Translator missing or incorrectly stated
4d - Date of Preparers/Translator's execution of form missing or incorrectly stated

SECTION 2 : EMPLOYER REVIEW AND VERIFICATION:

List A

5a - Type of List A document not checked
5b - Inappropriate document listed
5c - List A document identification missing
5d - List A document identification incorrectly stated
5e - List A document expiration date, if applicable, is missing or incorrectly stated
5f - Issuing Authority missing or incorrectly stated
5g - Work authorization not re-verified on or before date document expires
5h - Work authorization never re-verified
5i - Receipt accepted, but original document not presented within ninety (90) day

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I-9 KEY TO SYMBOLS (continued)

List B

6a - Type of List B document not checked
6b - Inappropriate document listed
6c - List B document identification missing
6d - List B document identification incorrectly stated
6e - List B document expiration date, if applicable, is missing or incorrectly stated
6f - State of identity document is not listed
6g - Receipt accepted, but original document not presented within ninety (90) days
6h - Document and issuing authority not specified

List C

7a - Type of List document not checked
7b - Inappropriate document listed
7c - List C document identification missing
7d - List C document identification incorrectly stated
7e - List C document expiration date, if applicable, is missing or incorrectly stated
7f - Employment eligibility not reverified on or before expiration of document
7g - Receipt accepted, but original document not presented within ninety (90) days
7h - Document and issuing authority not specified or incorrectly stated

Employer's Certification:

8a - Signature of company representative missing
8b - Signature of company representative incorrect (i.e., employee's signature, wrong placement)
8c - Name of company representative missing or incorrectly stated
8d - Title of company representative missing of incorrectly stated
8e - Name of company missing or incorrectly stated
8f - Address of company missing or incorrectly stated
8g - Date of company certification missing or incorrectly stated
8h - Company certification not signed within 3 days of hire
8i - Date of employment missing or incorrectly stated

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SECTION 3 : UPDATING AND REVERIFICATION

9a - Overdocumenting Work authorization
9b - Work authorization not re-verified on or before date document expires
9c - Work authorization never re-verified
9d - Requesting specific documents
9e - Document title missing or incorrectly stated
9f - Document number is missing or incorrectly stated
9g - Expiration date missing
9h - Employer signature missing
9i - Date missing
9j - Not signed on or before expiration date
9k - Date of rehire missing or incorrectly stated

OTHER

10a - Overdocumenting work authorization
10b - Requesting specific documents
10c - Entire Section 2 not completed

Cynthia Juarez Lange

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LCA Public Access File

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MERGER & ACQUISITION CHECKLIST

I. OBTAIN GENERAL INFORMATION

1. What are the structural elements of the corporate changes (e.g. Stock purchase, asset purchase, reverse triangular merger)?
2. What is the date of the proposed corporate change. Is there a target closing date?
3. Identify proposed changes to current corporate structure. (attach corporate relationship chart or description) Please identify proposed changes to foreign as well as US subsidiaries.
4. Will there be a corporate name change?
5. Will any of the locations/work sites change for any foreign national?
6. Will any federal tax identification numbers change?
7. Provide relevant portions of the merger agreement or other agreement affecting the restructuring of the entities that will employ foreign nationals.
8. Will there be a reduction in workforce? If so, in what departments and/or occupations?
9. List all employees in nonimmigrant status including the following information: name, petitioner/employer, current nonimmigrant status, current location, pending immigration matters (including stage in process)
10. List all employees in adjustment of status and the date adjustment was filed if available.
11. Provide copies of L blanket approval notices and petitions in support thereof for any companies involved.
12. Are any of the affiliated companies J-1 sponsors?

Additional documentation will be necessary depending on the types of visas employees currently hold.

III. LCA Due Diligence

1. Evaluate existing LCA's, including auditing of public access file and Government Audit documents.
2. Determine whether "actual wage" at work site will change and thereby require increase in H-1B workers' salaries
3. If new entity is willing to assume liabilities of previous entity's LCAs and the job and worksite location remain the same, new LCAs are not required. Additional documentation will be needed in the public access file for each LCA.
4. If new entity does NOT wish to assume liabilities of previous entity's LCAs, new LCAs are required but new H-1B Petitions are not required if a successor in interest relationship exists.
5. If there in job duties, or if the worksite is moved to outside the metropolitan statistical area ("MSA"), a new LCA is required and thus an amended H-1B is required. If the worksite is moved within the MSA, a posting is required at the new worksite.

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II. H-1B EMPLOYEES:

1. Evaluate whether new H-1B petitions must be filed due to new LCAs. (see above)
2. Determine if amended H-1B petitions should include extension of stay requests. If so, obtain information for corresponding extensions for family members
3. Determine if other potential changes are "material", e.g., will job duties change significantly? If "material" then new H-1B petition must be filed.

III. L-1 EMPLOYEES:

1. Analyze whether change in corporate relationships requires re-adjudication by INS of L-1 eligibility.
2. Determine if other potential job changes are "material" (e.g., significant change in job duties) requiring amended L petition.
3. Will the L-1 employer in US change? If employer changes (i.e., new taxpayer ID) an amended L is required.
4. File amended L-1s where required.

IV. L-1 BLANKET:

1. Review corporate relationships of current and proposed companies, including parent, subsidiaries, and affiliates
2.
3. Determine if any blanket L-1 workers will change to an employing entity not listed on the blanket petition. If so, an amended individual L or blanket L will be needed
4. File amended individual Ls if required
5. File amended blanket petition(s) if required

V. J-1 EMPLOYEES:

1. Determine if the approved training/research program will change and if so, how
2. Evaluate whether a change in program is necessary and whether new IAP-66 must be issued
3. Notify DOS if required

VI. TN EMPLOYEES:

1. Determine if job duties will change enough to effect TN eligibility.
2. File amended TN if job duties change sufficiently

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VII. E EMPLOYEES:

1. Determine if the "nationality" of the employer has changed
2. Determine if ownership percentages of the employer has changed
3. Determine if the E employees will remain employed by the present employer
4. For E visas based on foreign investment, determine if foreign investment will materially change
5. For E visas based on treaty trader activity, determine if qualifying activity will change
6. If required, file amended E petitions, or prepare new E visa applications for consular posts
7. If required, file new corporate registration materials with consular post
8. If company is no longer E qualifying, analyze alternative work classifications for E workers; file change of status applications where eligible

VIII. LABOR CERTIFICATIONS

1. If a given labor certification application is pre-recruitment, notify SESA if tax identification number and/or corporate name has changed
2. If post-recruitment, new labor certification will likely be required if:
   a. Material change in job duties
   b. Change in job location to a different MSA
   c. Significantly different salary

   [Overriding issue is whether recruitment for the position is still valid]
3. For RIR applications, determine if past recruitment is still valid
4. For RIR applications, determine if company can utilize new affiliate's recruitment
5. Clarify whether recruitment functions of the newly affiliated companies will change
6. If worker has an approved I-140 based on a labor certification, a new I-140 petition showing new employer entity is likely required

IX. MULTINATIONAL MANAGER IMMIGRANT VISAS:

1. Review the basis for qualification to determine if there been any material change in corporate relationship or managerial/executive function
2. File amended petition to obtain amended approval notice if required

X. ADJUSTMENT OF STATUS

1. Determine whether it has been more than 6 months since the filing of the Adjustment, and whether the employee will be employed in the same or similar occupational classification. If yes to both, no action need be taken.
2. Determine if the corporate change is material to the adjustment application
3. Determine whether appropriate to file amended I-140 or merely to notify INS of corporate change with adjustment filing

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XI. I-9 ISSUES/DUE DILIGENCE

1. Review merger agreement for I-9 liability and indemnity provisions
2. Determine whether to recommend to corporate counsel to perform due diligence audit on I-9s prior to merger
3. Determine whether company should assume old I-9s or complete new I-9s

XII. MISCELLANEOUS

1. Analyze process/timing issues with respect to INS notification
2. As deal progresses, and when restructuring is final, confirm that final structure was as planned at outset; if circumstances have changed, determine effect on analyses above

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U.S. NONIMMIGRANT VISA CHART

TYPE OF VISA	GENERAL PURPOSE FOR ENTRY	MAJOR REQUIREMENTS AND RESTRICTIONS	PERMISSIBLE ACTIVITIES UNDER VISA CATEGORY	MAXIMUM ALLOWABLE STAY PERIOD FOR EACH ENTRY	MAXIMUM TOTAL ALLOWABLE PERIOD FOR U.S. STAY
B-1 VISITOR VISA For short term business purposes.	To enter the U.S. temporarily in order to conduct business in the U.S. on behalf of an employer abroad.	• Principal place of employment and actual accrual of salary or profits are abroad. • Employer abroad should continue to pay employee's salary. • B-1 visitor should maintain his/her residence abroad during his/her stay in the U.S. • Should be used instead of visa waiver where expected stay will be longer than 90 days or if there is a possibility that the employee will change to another visa classification.	• Short term business purposes, for example: - Business negotiations; - Business conferring; - Making arrangements for a contract; - Plant tour; - Market research; - Attending a meeting, including an academic meeting; - Inspection; - Short term training.	Typically 6 months but may get up to 1 year on initial entry, based on demonstrated need.	Up to 1 year on initial entry, with extensions of 6 months each on a showing of business need.
B-2 VISITOR VISA Visitor for pleasure.	To enter the U.S. temporarily in order to engage in activities for pleasure.	•Visitor is not authorized to work in the United States.	• Tour; • Visit friends and family; • Participate in social events; • Receive medical attention; • Plan for or complete personal, family-related business matters; • Temporarily accompany family member who is in another visa category.	Typically 6 months but may get up to one year based on evidence of confirmed travel plans.	Up to 1 year on initial entry with extensions of 6 months each on a showing of need.

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B-1/B-2 VISA WAIVER Also known as "no visa" or "visa waiver pilot program."	To enter the U.S. temporarily in order to conduct B-1 business in the U.S. on behalf of an employer abroad, or to engage in B-2 activities for pleasure.	• In addition to the requirements for B-1 or B-2 (see above), the following conditions must be met: - Must be a national of, and coming from, a country which the U.S. has approved as a "visa waiver" country;[i] - Period of stay may not exceed 90 days, and; - Subject person should have a round trip air ticket on approved airline for travel back to home country or ticket for onward travel outside U.S., Mexico, Canada or adjacent islands in the Caribbean. • May not obtain an extension of stay or a change of status from the visa waiver program to any other visa status in the U.S. • Must waive right to procedural safeguards regarding entry into U.S.	See those listed for B-1 and B-2 above.	90 days (extensions of stay or changes of status are impossible).	90 days (extensions of stay or changes of status are impossible).
E-1 VISA For traders and key employees under the Treaty of Friendship, Commerce and Navigation between the U.S. and foreign country.	To work as an executive, supervisory or essential skills employee of a company which trades in goods or services principally between the U.S. and foreign country.	• 50% or more of the trading company's stock must be traded primarily on a foreign country stock exchange or owned by foreign country nationals (who are not U.S. permanent residents). • Employee entering U.S. must be foreign country national (family members need not be from same treaty country). • Subject person should be employed by the receiving company in a supervisory/managerial or executive capacity or in a capacity involving specialized skill or knowledge essential to operate the U.S. business. • The trading company must be engaged in substantial trade of goods or services, more than 50% of the international trade must be between the U.S. and foreign country.	• Performing services as an Executive; • Supervisor/Manager (Duties include management of either personnel or critical function); or • Specialist with essential skills.	• 1 year upon entry. • 2 years upon approval of extension application. • Family gets extension only for period of principal worker's authorized stay.	• Virtually no limit as long as alien is prepared to leave U.S. when job is over, or the requirements for E-1 are no longer met.

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E-2 VISA For investors and key employees under the Treaty of Friendship, Commerce and Navigation between the U.S. and foreign country.	To direct and develop one's investment in a U.S. business or to be an executive, supervisor or essential-skills employee of an organization which has made a substantial investment in a U.S. business.	• Subject person or his/her foreign country parent company should have made, or be actively in the process of making, a substantial amount of investment in the U.S. (The amount is subject to variation among industries, but may, in appropriate cases, range from as little as $50,000 to $1 million or more.) • 50% or more of the treaty-investment company's stock must be traded primarily on a foreign country stock exchange or be owned by foreign country nationals (who are not U.S. permanent residents). • Employee entering U.S. must be a foreign country national (family members need not be from same treaty country). • Subject person should be employed by the receiving company in a supervisory/managerial or executive capacity or in a capacity involving specialized skill or knowledge essential to operate the business. • Receiving company in the U.S. may be required to show that it will train U.S. worker to impart essential skills.	• Performing services as an Executive; • Supervisor/Manager (Duties include management of either personnel or critical functions); or • Specialist with essential skills, which may include a "Start-up" or temporary-duty ("TDY") worker, for example: trainer for plant start-up, quality control, or vehicle model changes.	• 1 year upon entry. • 2 years upon approval of extension application. • Family gets extension only for period of principal worker's authorized stay.	• Virtually no limit as long as alien is prepared to leave U.S. when job is over or U.S. investment ends. • Exception for "start-up" or TDY employees, who may be required to leave after one year or when operation is established and U.S. workers are trained.
F-1 VISA Student visa.	To study at an academic (non-vocational) institution (high school, college, university, or language school).	• Curricular Practical Training - May work part time (20 hours per week) during school, or full-time during vacation periods, in an area related to course work. • Post Completion Practical Training - After graduation, may be eligible to work full-time for up to 12 months in an area related to degree. • Other type of work permissible under limited circumstances.	Study; also may work in area related to study.	"Duration of Status" - period of time estimated by school, which is necessary to complete studies.	"Duration of Status" - period of time estimated by school as necessary to complete studies, plus up to one year for "post-completion practical training," i.e. work in field related to area of study.

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H-1B VISA For temporary workers in a specialty occupation.	To work in a "specialty occupation." i.e. an occupation requiring the theoretical and practical application of a body of highly specialized knowledge, which requires a minimum of a bachelor's degree for entry into the occupation.	• Must posses at least a bachelor's degree, or the equivalent in education and experience, in a field related to the proposed U.S. job. • Job in the U.S. must require an employee with a relevant 4-year bachelor's or higher degree or equivalent in education and experience. • "Specialized knowledge" (see L-1 classification below) is not required. • No prior work experience required for persons holding a relevant bachelor's degree. • No prior work experience at related foreign company is necessary. • U.S. company must post and file a Labor Condition Application ("LCA") making certain attestations regarding wages and working conditions.	• May work full or part time. • May be employed in more than one H-1B occupation as long as H-1B petition is approved for each specialty occupation.	Initially up to 3 years, with a three-year extension available.	6 years (or more if only _ time was spent in U.S. or if LC begun before the 5th year and approved before the 6th year.)

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H-3 VISA Temporary Trainee.	To enter U.S. temporarily to participate in a formal company training program.	• Petitioning company must demonstrate to INS: - Detailed training program exists; - Major portion of trainee's time is spent receiving instruction; little or no time spent in productive "on-the-job" employment, and; - Similar training is not available in trainee's home country. • The trainee cannot displace a U.S. worker. • Training cannot be conducted with the intention to eventually employ alien in the U.S. • Benefits of the training must be utilized in a foreign country. • After alien has stayed in the U.S. in H-3 classification for two years, he or she must be physically present outside the U.S. for at least six months prior to re-entering in H or L classification. • Alien may not already possess substantial training and experience in the field of proposed training.	• Engaging in an established training program. • Receiving instruction.	Determined by the documented length of the training program and as shown on petition approval notice; up to two years.	• Two years. • After alien has stayed in the U.S. in H-3 classification for two years, he or she must be physically present outside the U.S. for at least six months prior to re-entering in H or L classification.

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J-1 VISA Exchange visitor.	Temporary visitor to give or receive training or to participate in approved exchange visitor program to teach, study, observe, conduct research, consult, or demonstrate special skills.	• Exchange Visitor Sponsorship Program must be approved by United States Information Agency ("USIA"). • Sponsor must be a U.S. company, agency, non-profit foundation or organization. The alien may enter to participate in either the U.S. company's approved program or be sponsored by an affiliated program. • Exchange visitor must have sufficient knowledge of the English language to undertake program. • Exchange visitor must have sufficient funds to cover expenses or has made other arrangements to provide for expenses. • Certain J-1 categories are restricted from changing status until the J-1 visa holders have resided and been physically present outside the U.S. for at least two years after departing U.S. ("two-year home residence requirement").	• Giving or receiving training. • Teaching. • Studying or observing. • Conducting research. • Consulting. • Consulting on, or demonstrating special skills ("special skills" are similar to skills of a worker in a "specialty occupation" as set forth in H-1B above). • Attending school.	• Determined by type of program. • Trainee - up to 12 months. • Short-term scholar - up to 4 months. • "Specialist" - up to one year. • Professors/ researchers at educational institution up to 3 years.	• Determined by the approved length of program. • Extensions available if participation in program is extended. However, exchange visitor allowed to remain in U.S. only so long as necessary to satisfy his/her stated objectives in coming to U.S.

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L-1A/L-1B VISA For intra-company transferee, including transfers to subsidiaries or affiliates.	To work as an executive, manager, or worker with specialized knowledge in a parent, subsidiary, affiliate, or representative office in the U.S.	• Subject person will be employed in the U.S. by the same company or a parent, subsidiary or affiliate (requires at least 50% common ownership or actual control). • U.S. job must be in a managerial or executive capacity (L-1A), or in a capacity involving "specialized knowledge," (L-1B). • Subject person must have been employed by the parent company, or a subsidiary or affiliate outside the U.S. in a managerial, executive or specialized knowledge capacity for one year or longer in the three years immediately before the visa petition is filed. • "Specialized knowledge" refers to knowledge of the petitioning organization's product, service, research, equipment, techniques, management, or other interests, and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures. • No university education required. • "Managerial" may include managing an essential function within the organization or a department or subdivision of the organization. • Company may obtain blanket L-1 visa if: it is engaged in commercial trade or services; it has an office in the U.S. and has been doing business for at least one year; it has three or more domestic and foreign branches, subsidiaries, or affiliates; and the group of affiliated entities must have one of the following: (a) obtained approval of petitions for at least ten L-1 executives, managers, or specialized knowledge professionals during the previous twelve months; or (b) achieved combined annual sales of at least $25,000,000; or (c) employ a U.S. work force of at least 1,000 workers.	Performing Services as an: • Executive (L-1A) - May include either (a) traditional executives, (e.g. President, Vice President, Corporate Secretary or Treasurer), or (b) senior project manager who is not required to manage personnel. • Manager (L-1A) - Must manage professional personnel (including authority to recommend or make such decisions as hiring, promotion or termination), or manage an essential function of the company. • Specialized Knowledge (L-1B) - Those with specialized knowledge as defined in the previous column.	Executive/Manager (L-1A) Initially up to 3 years, with two two-year extensions available. Specialized Knowledge (L-1B) Initially up to 3 years, with one two-year extension available.	Executive/Manager (L-1A) Seven years (or more if can prove 1/2 time was spent in U.S.) Specialized Knowledge (L-1B) Five years (or more if can prove 1/2 time was spent in U.S.)

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O VISA	To perform services relating to an event or events.	• Must possess extraordinary ability in the sciences, arts, education, business or athletics OR have a demonstrated record of achievement in the motion picture or television industry. • Must obtain "consultation" from appropriate peer group, labor, or management organization. • "Petitioner" may be US employer or agent.	• Perform services in the area of extraordinary ability or achievement. • May work for more than one employer as long as either a separate O petition is approved for each employer or each project has been approved by INS.	Initially up to 3 years, with one-year extensions available.	No specified limit but must demonstrate that services will relate to a specific event or project.
Q VISA For cultural exchange programs.	To participate in an international cultural exchange program that allows employment authorization.	• Cultural component of program must be designed to explain the attitude, customs, history, heritage, philosophy or traditions of home country. • Work component of program must not be independent of the cultural component. • Essential element of work or training must be to provide opportunity for American public to learn about foreign cultures. • Alien who has been admitted to U.S. in Q status may not be readmitted in Q status unless the alien has been physically present outside of U.S. for one year (but alien may change to another nonimmigrant status). • Changes to other nonimmigrant classifications is permissible. • There is no provision for derivative entry by family members. Nevertheless, family members ordinarily may enter in B-2 status.	• Work or receive training. • Examples of cultural component of programs include: - Lecture series; - Seminars; - Courses; - Demonstrations; and, - Other forms of public outreach.	Duration of program, up to 15 months.	15 months.

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TN VISA For Canadians and Mexicans.	To engage in business activities at a professional level.	• Business activity must be in a profession listed in Appendix 1603.D.1 to NAFTA. • Generally, bachelor's degree in relevant field is required. Three of the exceptions to this are: 1) Computer Systems Analyst. - Post secondary certificate, plus 3 years experience is acceptable. 2) Management Consultant. - 5 years experience as Management Consultant or in field of specialty relating to consulting agreement. 3) Scientific Technician/Technologist. - Must demonstrate possession of theoretical knowledge in specified discipline (e.g. engineering) and ability to solve practical problems in discipline. • For Mexicans, U.S. company must post and file a Labor Condition Application ("LCA") making certain attestations regarding wages and working conditions.	• May be employed in more than one TN occupation as long as TN petition is approved for each occupation.	One year.	No specified limit, but alien must be able to continue to prove non-immigrant intent and continuance of permanent residence outside the U.S.

i. Visa waiver countries as of January 1998 include: Andorra, Argentina, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, San Marino, Spain, Sweden, Switzerland, and the United Kingdom.

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The H-1B/LCA Public Access File -- New Obligations of H-1B Employers

By Cynthia Juarez Lange and Catherine Haight

Labor Condition Application ("LCA") "Public Access Files" have taken on greater significance in the process of hiring H-1B workers as a result of the implementation of the ACWIA[1] Interim Final Rule (the "Interim Rule"), which generally took effect January 19, 2001. The Interim Rule imposes additional record-keeping responsibilities on H-1B employers, and the interpretation of these new requirements is still evolving.

LCAs and employer Public Access Files were originally mandated by the Immigration Act of 1990 ("IMMACT '90"). IMMACT '90 significantly overhauled the Immigration and Nationality Act ("INA"), including the provisions related to H-1B workers. Among other changes, IMMACT '90 required employers to file an LCA, including four attestations, [2] with the Department of Labor ("DOL") prior to filing a petition to employ an H-1B worker. In addition, the statute required that two broad categories of records be maintained by H-1B employers:

(1) Records to be made available for public inspection within one (1) working day after filing an LCA. These are commonly known as "Public Access File" documents; and
(2) Records to be made available to the DOL upon request, but which need not be maintained in the Public Access File.[3]

The Interim Rule promulgated by the DOL revised the LCA form to include several new employer attestations[4] and mandate the maintenance of additional records in connection with LCA filings. This article addresses the documents now required in an employer's Public Access File.

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[1] American Competitiveness and Workforce Improvement Act of 1998
[2] The employer will pay the H-1B worker the greater of the actual or prevailing wage; the employment of the H-1B worker will not adversely affect the working conditions of workers similarly employed in the area of intended employment; there is no strike or lockout at the place of employment; and notice was provided to workers at the worksite where the H-1B worker will be placed.
[3] These include payroll records for a period of three years from the date of the creation of the records, a full description of the company's benefits plan, dependency calculation records, records of hours worked by hourly and part-time H-1B workers, prevailing and actual wage sources, information regarding working conditions, and copies of INS petitions.
[4] The Interim Rule requires that employers also attest that H-1B workers will be offered benefits and eligibility for benefits on the same basis, and in accordance with the same criteria, as offered to U.S. workers. Moreover, additional attestations related to the displacement, hiring, and recruitment of U.S. workers are required if an employer is "H-1B dependent" or is a "willful violator," as defined in the regulations.

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It is important to note that a violation of the LCA regulations regarding Public Access Files can result in a civil money penalty of up to $1,000 per violation. This penalty may be imposed if the violation impedes the public from obtaining information to file a complaint or information regarding an alleged violation of the LCA laws (INA 212(n)), or impedes the DOL from determining whether there has been a violation of the LCA laws.[5] Therefore, the proper maintenance of an employer's Public Access File(s) is of paramount importance.[6]

Documents to be Included in a Public Access File

An employer's Public Access File must include the following documents for each LCA it files after January 19, 2001.

1. **A copy of the completed LCA.** An employer's Public Access File must contain a copy of the LCA filed with the DOL. The LCA need *not* be the certified LCA returned from the DOL, however if an LCA is filed by fax, the LCA bearing the original signature must be maintained in the Public Access File. At a March 13, 2001 American Council on International Personnel (ACIP) meeting with the DOL, however, the DOL indicated that the LCA bearing the original signature may be maintained by the employer's attorneys if the LCA can be made available relatively quickly to the DOL in the event of an enforcement action.

2. **A copy of the LCA cover pages**. The new regulations require that the LCA cover pages (ETA 9035CP) also be maintained in the Public Access File.

3. **Wage rate statement.** This is simply a statement of the wage rate to be paid to the H-1B workers(s) covered by the LCA. The statement may be included in the "actual wage memo," described below. The wage rate may be expressed as a range, but the "bottom" of the range must at least meet the prevailing wage.[7] The wage rate is deemed to "meet" the prevailing wage if it is within 5 percent of the prevailing wage.[8] For confidentiality reasons, an H-1B worker's name, social security number, or other notation which is easily associated with an H-1B worker, should not be reflected on the wage rate statement, or anywhere in the PAF.

   Although the Interim Regulations are not clear on this issue, the DOL may require a *separate* wage rate statement for each worker under a "blanket" LCA.[9] Until further

[5] 20 CFR 655.810(b)(1)(vi). In some circumstances, higher penalties may be imposed for violations related to the preparation of an LCA or the supporting records.
[6] An employer may maintain a separate Public Access File for each LCA filed with the DOL, or may create one Public Access File containing documents clipped together for each LCA.
[7] 20 CFR 655.731(a)(2)(vi)
[8] 20 CFR 655.731(a)(2)(iii). The "5% rule" does not apply to determinations made pursuant to a union contract, the Davis-Bacon Act, or the McNamara-O'Hara Service Contract Act.
[9] A "blanket" LCA is one which may be utilized for more than one H-1B worker.

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guidance is provided, however, an argument may be made that one wage statement for each LCA meets the regulatory criteria.

4. **"Actual wage" memorandum.** The "actual wage" may be a confusing phrase because it may *not* be the wage paid to the H-1B worker(s). The "actual wage" is defined in the regulations as the wage paid by the employer to all other employees at the worksite with similar experience and qualifications for the specific employment (substantially the same duties and responsibilities). It is *not* computed simply by averaging the wages for all other workers in the same position.

   The regulations originally required that the actual wage memorandum describe the employer's wage system with such particularity as to allow a third party to compute the H-1B workers' wages.[10] This requirement, however, imposed an unrealistic standard for all but a few occupations. The recently promulgated regulations softened this requirement.

The new regulations require that employers describe the system for computing the actual wage with sufficient particularity for a third-party to be able to *understand it*, including a description of any periodic increases.[11] At a minimum, the memorandum must describe the business-related factors used to determine the actual wage. The regulations enumerate the following factors which may be taken into consideration by an employer:

- experience
- qualifications
- education
- job responsibility and function
- specialized knowledge
- other legitimate business factors (i.e., ". . . those that it is reasonable to conclude are necessary because they conform to recognized principles or can be demonstrated by accepted rules and standards.")[12]

5. **Prevailing wage documentation.** The Public Access File must include a copy of the documentation the employer used to determine the prevailing wage.[13] Essentially, the documentation must reflect the source and methodology used to calculate the prevailing wage. Typically, employers include a copy of the relevant wage survey, (including pages which reflect the job description, breakdown of the various levels within the occupation, description of the education or experience required for the position, the locality of the survey, salary/wages for the occupation, etc.), or a copy of the DOL State Employment Security Agency ("SESA") Prevailing Wage Determination, if this was used.

[10] Appendix A to subpart H of 20 CFR 655
[11] Comments to Final Rule p. 80194
[12] 20 CFR 655.731(a)(1)
[13] 20 CFR 655.760(a)(4)

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The job title reflected in a particular prevailing wage survey only provides some guidance as to the appropriateness of a survey. To assure the most appropriate survey is used, the job duties described in the survey must be compared with the H-1B workers' job duties.

6. **Notice documentation.** The Public Access File must include a copy of the document with which the employer provided notice to affected workers or to the collective bargaining representative.[14] In the past, employers typically satisfied the notice requirement by simply posting hard copy notices of the LCA filing (such as an exact copy of the LCA) in two conspicuous locations at each worksite where the H-1B workers would be performing work (assuming no collective bargaining representative). Under the new regulations, however, an employer may provide notice by either posting hard copy notices, or by providing electronic notice (*e.g*., email notification, electronic newsletter, or posting to the employer's home page or electronic bulletin board, pursuant to specific requirements set forth in the regulations).

   An employer's Public Access File should contain a copy of the document used to provide notice, whether it is a copy of the posted LCA (or other hard copy), or a copy of the electronic notice. In addition, although *not* required to be maintained in the Public Access File, employers should maintain evidence of the dates and locations of the hard copy postings. Alternatively, if the notice is posted electronically, employers should maintain evidence of the dates and manner of electronic distribution. Note that if the H-1B worker will be performing services at a third party location, posting will have to be made at the third party location.

7. **Benefits documentation.** The Public Access File must include documentation demonstrating that the employer is offering H-1B workers benefits and eligibility for benefits on the same basis and in accordance with the same criteria as the employer offers similarly employed U.S. workers. Accordingly, the file must contain the following three records:

   - **A summary of benefits offered to U.S. workers in same occupational class as the H-1B workers.**
   - **If employees are not all offered or do not receive the same benefits, a statement as to how any differentiation in benefits is made.** Distinctions may be made which are not based on H-1B status (*e.g*., full-time versus part-time employees or professional versus non-professional staff), as long as U.S. workers are treated the same.
     - A company may offer the same array of benefits to its employees, for example, through cafeteria-style benefits, and employees may choose the benefits they wish

[14] 20 CFR 655.760(a)(5)

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to receive. This is appropriate as long as the employer does not attempt to influence decisions and workers receive the benefits they choose.

- H-1B workers may be provided with greater or additional benefits as long as this does not discriminate against U.S. workers. For example, if an employer provides additional leave for all expatriate employees, U.S. or foreign, then H-1B employees on temporary assignment to the U.S. may receive additional leave.

- **If applicable, a statement that some or all H-1B workers are receiving home country benefits.** In certain limited circumstances set forth in the regulations, multinational employers may elect to leave H-1B workers on their "home country" benefits plan instead of offering U.S. benefits.

8. Other documents which must be included in the Public Access Folder in certain circumstances:

After a corporate change: Where an employer undergoes a change in corporate structure (*e.g.,* merger, acquisition, spinoff, etc.) and chooses to assume the LCA obligations of the previous employer, four additional documents must be maintained in the Public Access File:

- **A sworn statement by an authorized representative of the new employing entity expressly:**
  - acknowledging that it will assume all obligations, liabilities and undertakings under the LCAs filed by the predecessor employing entity;
  - agreeing to abide by the DOL's H-1B regulations applicable to the LCAs;
  - agreeing to maintain a copy of the statement in the Public Access File; and
  - agreeing to make the document available to the public or DOL upon request.
- **A list of each affected LCA and its date of certification.**
- **An actual wage memorandum** (description of the actual wage system) for the new employing entity.
- **The employer identification number for the new employing entity** (even if not changed).[15]

One possible storage solution is to maintain the sworn statement and list of LCAs in one master Public Access File, available upon request, rather than in each Public Access File. The same information would still be available to the public, but it would eliminate the need to photocopy so much duplicative information.

Where employer is H-1B dependent: The Public Access File must include a summary of the recruitment methods used and the time frames of recruitment of U.S. workers.[16] A

[15] 20 CFR 655.730 (e)(1)

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memo or copies of pertinent documents will suffice.[17] In addition, if an employer is "H-1B-dependent" and/or a "willful violator," and indicates on an LCA that only "exempt" H-1B workers will be employed, the Public Access File must include a list of such "exempt" H-1B workers.[18]

Where employer uses "single employer" concept for determining H-1B dependency: If the employer is a "single employer" (as defined by the Internal Revenue Service) for purposes of determining its H-1B dependency, the Public Access File must also include a list of the entities included as part of the "single employer" in making the determination.[19]

Public Access Files Are Public Records

As its name implies, a Public Access File is a public record and may be examined by any interested party. Accordingly, employers should be careful to keep private information, such as employee names and social security numbers, excluded from Public Access Files. In order for employers to identify which documents are associated with an H-1B worker, employers may "code" the documents in some fashion, and prepare a "master list" of
H-1B workers and files. For example:
File folder #__________; LCA number ____; H-1B worker's name[20]

This "master list" should be maintained *separately* from the Public Access File and any other LCA records which would be produced to the DOL if requested.

Many who commented on the initial LCA regulations recommended that the DOL protect confidential employer information. The DOL concluded, however, that the statute overrode such concerns and Public Access Files were mandated.[21] Moreover, the DOL warned that any employer information submitted as evidence at a hearing on an LCA violation would also be a matter of public record.[22]

Where and When

The regulations require that an employer's Public Access File be available for public examination either at the employer's principal place of business in the U.S. or at the H-1B

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[16] 20 CFR 655.760(a)(10)
[17] 20 CFR 655.739(i)(4)
[18] 20 CFR 655.760(a)(9)
[19] 20 CFR 655.760(a)(8)
[20] If you create the list using the "table" function in Word, for example, you can alphabetize the list, or search for all names associated with an LCA, simply by re-sorting the table.
[21] (Introductory background to initial regulations, Fed. Reg. Vol. 57, No. 8, Jan 13, 1992, at p. 1323.)
[22] (*Id.*)

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worker's place of employment.[23] This requirement, however, is not logistically reasonable for many companies which have immigration or records departments in other locations. We are hoping that discussions with the DOL on this issue will lead to a revised policy.

All required Public Access File records must be available for public inspection within one (1) working day after the date an LCA is filed.[24] The records must be retained for the following length of time:

- If any H-1B worker was employed under the LCA: one (1) year beyond the last date on which the H-1B worker was employed.
- If no H-1B workers were employed under the LCA: one (1) year from the date the LCA expired or was withdrawn.[25]

A Final Note

Once a system is in place for setting up Public Access File documentation for new H-1B employees, maintaining the Public Access File should become systematic. Having more than one person in the company familiar with the internal procedures for setting up and maintaining the Public Access File will ensure continuity and consistency in record-keeping should one person become unavailable. Finally, be sure that those involved in maintaining the Public Access File documents are aware of the confidentiality issues, such as employee names and social security numbers. This information can be easily overlooked and mistakenly included in a Public Access File.

[23] 20 CFR 655.760(a)
[24] (*Id.)*
[25] 20 CFR 655.760(c)

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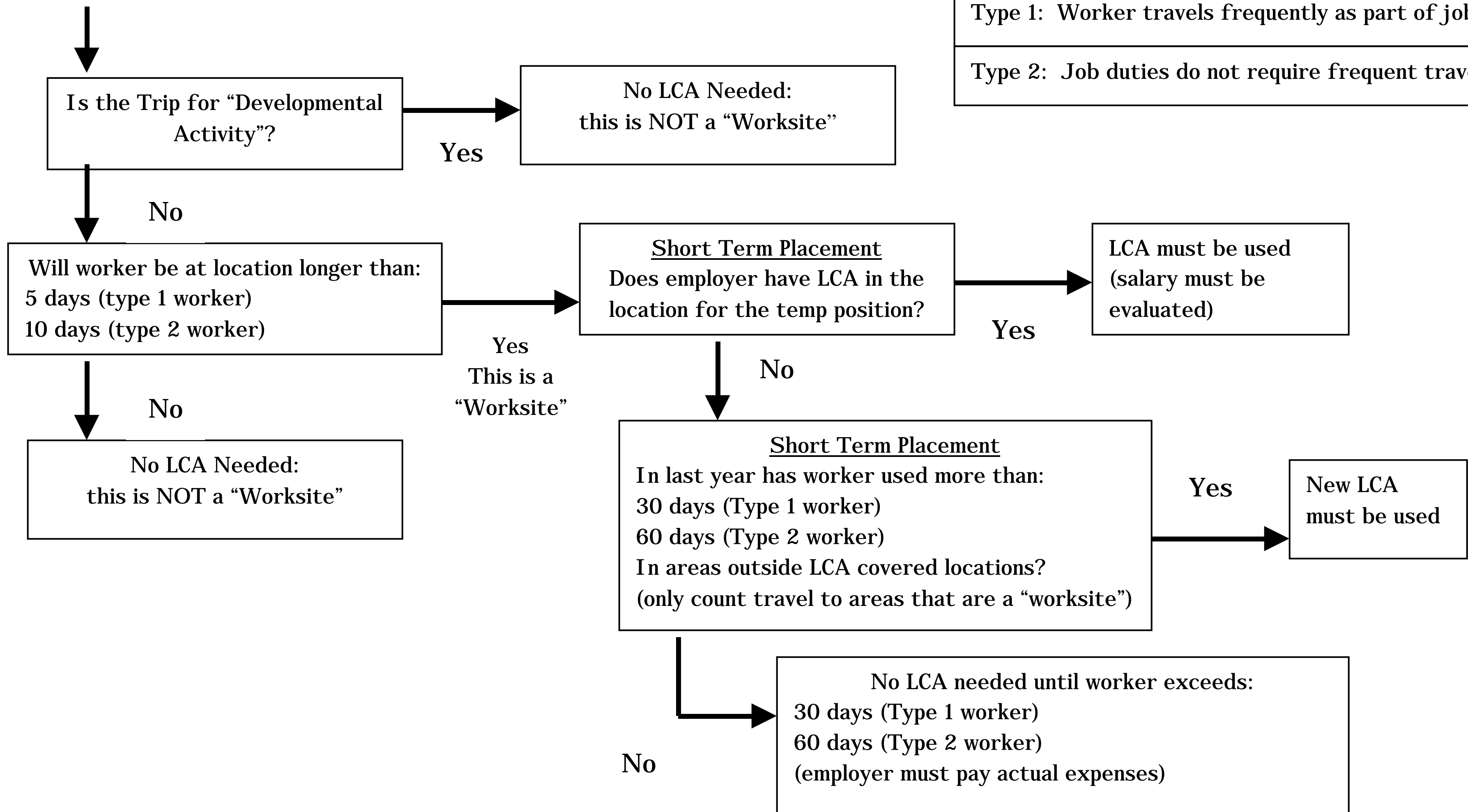

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