

Best Practices to Prepare for and Navigate DOJ Immigration Investigations

A subsection of the U.S. Department of Justice's (DOJ) Civil Rights Division, the Immigrant and Employee Rights Section (IER), formerly the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), enforces the anti-discrimination provision of the Immigration and Nationality Act and the accompanying regulations (8 U.S.C. § 1324b and 28 C.F.R. Part 44). Individuals who believe they have been discriminated against may file a charge against an employer in much the same way people may file charges with the Equal Employment Opportunity Commission (EEOC). And, much like the EEOC, upon receiving a charge, IER begins an investigation.

In 2017, IER rolled out the "Protecting U.S. Workers Initiative," which "investigates and brings enforcement actions against employers that intentionally discriminate against U.S. workers due to a preference for temporary visa workers." In short, the program targets employers that allegedly discriminate in their use of H-1B, H-2A, and H-2B visas.

IER also commonly investigates employers' documentary screening practices related to the Form I-9, Employment Eligibility Verification. The Form I-9 requires employees to provide evidence of their identity and employment authorization, which an employer must document in Section 2. Employees have the right to choose which specific document they provide to their employer, and the Immigration and Nationality Act forbids employers from requiring specific documentation to complete employees' I-9 forms. Often, employers who believe they are simply being prudent or thorough in verifying employees' I-9 information find themselves in hot water with IER by requiring additional or particular documents from employees.

IER's Investigative Authority Is Very Broad

The scope of IER's investigatory power is incredibly broad. In addition to investigating allegations in individual charges, the section "has authority to initiate independent investigations based on information developed during individual charge investigations, or information provided by other government agencies and the general public." Even if a charge alleges a single, specific violation, IER may investigate *any* potential violations of which it becomes aware, regardless of whether such practices were identified in an individual's initial charge.

For example, if someone files a charge against an employer alleging an isolated instance of discrimination, IER may interview employees as part of its investigation. IER may then broaden the scope of its investigation based on information obtained in those employee interviews. In this way, investigations can grow to encompass an employer's company-wide hiring practices. Once it has begun an investigation, IER may end up essentially auditing an employer's entire immigration program.

Takeaways for Employers

Involve attorneys in the immigration sponsorship or visa process. Because IER's investigative authority is so broad and can result in sweeping audits of employers' immigration practices, it is crucial to involve attorneys in

the immigration sponsorship process. Working with immigration and employment law specialists can help ensure employer practices comply with the myriad complex legal requirements in play.

Train employees on required processes. In the course of its investigations, IER often interviews employees to better understand employers' immigration policies and hiring programs. As such, it is important to ensure each employee involved in the hiring process understands the expectations and legal requirements.

Document each step of the hiring process. Accurate, comprehensive records aid investigators and protect companies. When hiring for an open position, document which potential applicants the company reaches out to and how they are contacted. For example, for the permanent labor certification process (PERM), which is the first step of an employer-sponsored green card process, before filling an open position with a non-citizen employee, employers may be required to contact certain former citizen-employees who were laid off. Documenting this process—keeping a record of when and how former employees were contacted—is vital because it creates a helpful paper trail for investigators.

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This article was previously published on Westlaw Today on March 25, 2021.

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