# Immigration-Related Employment Discrimination

## IRCA'S Prohibitions, Procedures, and Remedies

**By Lucas Guttentag***

Section 102 of the Immigration Reform and Control Act of 1986 (IRCA) created a new cause of action prohibiting discrimination on the basis of national origin and citizenship status and established a special administrative process for prosecuting claims. The provision, codified as section 274B of the Immigration and Nationality Act, 8 U.S.C. § 1324B, applies to all "persons or entities" with more than three employees. The statute also created the Office of Special Counsel for Immigration-Related Unfair Employment Practices (within the Department of Justice) to investigate violations and enforce the discrimination prohibitions.

Section 274B was added to IRCA as a result of congressional concern that employer sanctions would result in discrimination in employment against non-citizens, ethnic minorities, or anyone perceived by an employer as looking or sounding "foreign." Existing federal statutes were deemed insufficient to address this threatened impact because of their limited coverage and their complex enforcement procedures. For example, existing federal statutes do not unambiguously prohibit private discrimination on the basis of alienage or citizenship status, many small employers are exempt from the prohibitions of Title VII of the Civil Rights Act of 1964,[1] and federal court actions to enforce existing statutory prohibitions can be slow and costly. As a result of section 274B, the percentage of American employers covered by federal anti-discrimination laws has been increased from approximately thirteen percent to forty-eight percent, and a speedy and less expensive administrative remedy has been instituted.

Regulations implementing section 274B are codified at 28 C.F.R. § 44 *et seq.*[2] Proposed regulations setting forth procedural rules for administrative enforcement hearings are set forth at 52 Fed. Reg. 44,972 (November 24, 1987).[3]

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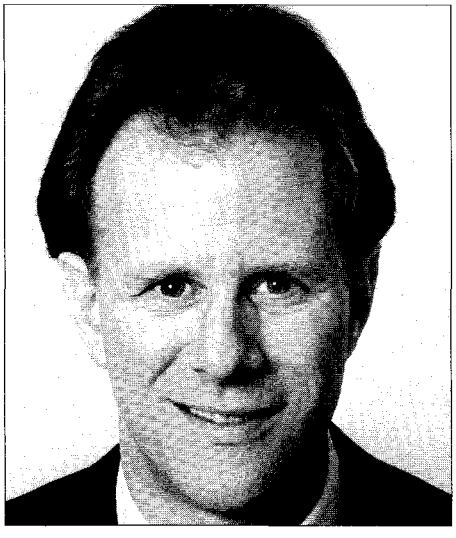

### Affected Employers and Prohibited Conduct

Section 274B(a)(1) provides:

> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee . . . or the discharging of . . . [an] individual . . .
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a citizen or intending citizen . . . because of such individual's citizenship status.

#### *A. Any Person or Entity with More Than Three Employees Is Covered*

• Person or Entity. Section (a)(1)[4] applies to every "person" or "entity" with more than three employees. The law does not use the term employer and does not limit or define the terms person or entity. Every individual, partnership, company, corporation, association, or agency that is not otherwise exempted, is covered. Legislative statements addressing the scope of §274B when it was initially introduced confirm that the provision's coverage should be given the broadest possible scope.[5]

• **Governmental Entities.** Governmental employers or entities are not excluded from coverage, nor is there any evidence in the legislative history to support a claim that they are exempt. Federal, state, and local governmental departments, agencies and individuals who employ more than three workers are subject to the same prohibitions on discrimination as all other employers.

A governmental employer who discriminates against aliens because it is required to do so by law is—like other employers—entitled to invoke the statutory defense discussed below. But in the absence of such an affirmative legal duty, the governmental employer is liable.

• **Minimum Number of Employees.** Section 274B does not apply to employers with three or fewer employees.[6]

##### *1. Calculating the Number of Employees*

**Statute and Regulations.** The term employee is not defined in section 274B, the regulations implementing it, or elsewhere in the Immigration and Nationality Act (INA). However, the term is also employed in the employer sanctions section of IRCA and is defined in those regulations as "an individual who provides services or labor for an employer for wages or other remuneration . . ." excluding independent contractors and certain qualifying domestic employees.[7]

**Analogous Statutes and Common Law.** In the context of other federal anti-discrimination statutes, such as Title VII, courts have generally relied upon the nature of the employer/employee relationship and the common law distinction between employees and independent contractors to determine who qualifies as an employee.[8]

Although many factors are relevant, the primary criteria are the degree of control exercised by the putative employer, the conditions of work, and the method of compensation.[9] A regular part-time worker is counted as an employee.[10]

*2. Duration of Three-Employee Minimum*

Section 274B does not require that an employer have more than three workers in its employ for a designated period of time. An employer is covered at all times during which more than three employees are employed. The preamble to the implementing regulations provides that "the Special Counsel will calculate the number of employees . . . by counting all part-time and full-time employees employed on the date that the alleged discrimination occurred."[11]

In contrast, Title VII requires that the employer must have at least fifteen employees for at least twenty weeks in the current or most recent calendar year. Section 274B dispenses with the twenty-week rule in order to bring seasonal employers within the scope of the section.

*B. Employer Conduct That Is Subject To Prohibition Against Discrimination*

Section (a)(1) specifically enumerates four areas of employer conduct where discrimination is prohibited: hiring, discharge, recruitment for a fee, and referral for a fee. Employer actions fairly encompassed within these categories, such as terms and conditions of employment, work rules, and wage scales, may also be covered.

• **Hiring and Recruitment or Referral for a Fee.** The "hiring" and "recruiting and referral for a fee" terminology parallels the language in the employer sanctions portion of IRCA. The "for a fee" language modifies both "recruiting and referral." The regulations promulgated pursuant to the sanctions provision specifically provide that union hiring halls do not engage in "referral for a fee."[12] The discrimination regulations are silent on this issue.

• **Discharge and Constructive Discharge.** The prohibition against discrimination in discharge should apply equally to conduct that constitutes "constructive discharge," as that doctrine has been developed in other employment contexts. Constructive discharge occurs when an employer makes an employee's working conditions so intolerable that a reasonable person would feel forced to resign.[13]

• **Other Employment Practices.** Other aspects of the employer/employee relationship may also be covered by section 274B if they are fairly encompassed within hiring, discharge, referral, or recruitment. For example, disparities in salary, working conditions, work rules, or benefits that exist at the time of employment constitute discrimination "with respect to . . . hiring." The preamble to the regulations states that section 274B does not prohibit discrimination in compensation, promotion, or any other terms or conditions of employment other than hiring, firing, and recruiting. However, the issue is not free from controversy since the legislative history explicitly asserts that a pay disparity between citizen and alien employees would constitute unlawful discrimination. Other practices, such as promotion decisions, were deemed to be outside the purview of IRCA by some members of Congress.[14]

• **Retaliation.** The regulations also specifically prohibit any person or entity covered by section 274B from engaging in intimidation or retaliation against any individual for the purpose of interfering with any of the rights or privileges secured by the law or for the purpose of deterring individuals from assisting in the investigation or prosecution of a charge.[15]

*C. Types of Illegal Discrimination: National Origin and Citizenship Status*

Section 274B prohibits national origin and citizenship status discrimination. The national origin provision applies to all employers not subject to Title VII's prohibition against national origin discrimination. The citizenship status provision applies to *all* employers, without regard to Title VII, but can be invoked only by U.S. citizens and aliens who qualify as "intending citizens."

• **National Origin Discrimination.** The prohibition against national origin discrimination applies to all employers (of more than three workers) who are not already covered by Title VII and may be invoked by any employee who is not an unauthorized alien. This provides protection to U.S. citizens as well as to any alien who is authorized to work, including non-immigrant aliens who have been granted work authorization or who are entitled to work by virtue of their visa category.[16] Execution of an I-772 Declaration of Intending Citizen (see below) is not a predicate to filing a national origin claim.

*1. Defining National Origin.* National origin is not defined by IRCA. A significant body of case law and administrative practice has defined the term in the context of Title VII, where the statute is also silent. In *Espinoza v. Farah Mfg. Co.*,[17] the Supreme Court noted the sparse legislative history defining national origin and concluded that the term refers both to "the country where a person was born" as well as to "the country from which his or her ancestors came." The Court found that Congress had intended to treat "national origin" and "ancestry" synonymously.[18]

An employer who disfavors one nationality group in relation to the rest of the work force is engaging in national origin discrimination whether the disfavored individuals are singled out on the basis of their ethnic origin or on the basis of the country of their birth. The Equal Employment Opportunity Commission (EEOC), the administrative agency charged with investigating alleged violations of Title VII, defines national origin discrimination as encompassing differing treatment of an individual because he or she "has the physical, cultural, or linguistic characteristics of a national origin group."[19] The EEOC definition relates directly to the congressional concern "that some employers may decide not to hire 'foreign' appearing individuals to avoid sanctions."[20]

*2. Employers Covered By Title VII Are Not Covered By Section 274B.* Section 274B's national origin provision does not apply if "the discrimination with respect to that person or entity and that individual with respect to that person or entity and that individual is covered" by § 703—the national origin provision—of Title VII.[21] Since Title VII applies only to employers who employ fifteen or more workers for at least twenty weeks in the current or previous calendar year, the national origin prohibition of IRCA applies to all employers with fewer than fifteen (and more than three) employees, *i.e.*, with four to fourteen employees. Even an employer with more than fifteen employees may fall within the coverage of section 274B if the workers are not counted as employees under Title VII because they do not meet the twen-

ty-week rule.[22] Likewise, an employer who is exempt from Title VII for any other reason is subject to section 274B's national origin prohibition.

• **Citizenship Status Discrimination.** Only "citizens" and "intending citizens" are protected against "citizenship status" discrimination. Both categories of protected individuals are defined in IRCA, either directly or by reference to related statutory definitions in the INA. The prohibition on citizenship status discrimination is not the equivalent of a general prohibition against discrimination on the basis of alienage.

*1. Citizen and National.* Section (a)(3) defines a citizen as an individual who is a "citizen or national" of the United States. Under the INA, a national of the United States is "a person who, though not a citizen of the United States, owes permanent allegiance to the United States."[23] The status of national is the product of legislation or other action by the federal government and cannot be created by a mere assertion of allegiance. The term has been applied primarily to inhabitants of territories acquired by the United States and now applies to an extremely limited number of persons, such as certain natives of American insular possessions.

*2. Intending Citizens.* Intending citizens are those aliens who have attained one of four specifically enumerated immigration statuses *and* who have taken certain specifically prescribed steps leading toward naturalization.[24]

**Status.** The four categories of aliens who qualify as intending citizens are: legal permanent residents (*i.e.*, aliens who have "green cards"); aliens who have been granted temporary residence status under the legalization provision of IRCA;[25] aliens who were admitted to the United States in the status of refugees under Section 207 of the INA;[26] and aliens who have been granted political asylum under Section 208 of the INA.[27]

Generally, aliens who have applied for but not yet been granted one of the enumerated statuses do not qualify as "intending citizens" even though they may have obtained employment authorization from the INS. However, once a legalization applicant is granted temporary resident status pursuant to INA § 245A, that status relates back to the date the application was filed. Thus, an alien who obtains legalization may file a citizenship status discrimination claim for discrimination that he or she suffered before the legalization application was adjudicated.[28]

Aliens holding non-immigrant visas who are authorized to work, either by virtue of their visa or as the result of a discretionary decision by the Attorney General, do not qualify as intending citizens. Common non-immigrant visas where work is or may be authorized include temporary workers (H-1, H-2, H-3), students (F-1), exchange visitors (J-1), employees of foreign employers or international organizations (B-1, G-1, G-2, G-3), and spouses of some non-immigrant visitors (J-2, G-4).[29]

**Declaration of Intention to Become Citizen.** An alien who is in one of the four qualifying categories must also declare his or her intent to become a citizen and make prompt efforts to become naturalized upon becoming eligible to do so.

Section (3)(B)(ii) requires a qualifying alien to complete a "declaration of intention to become a citizen" in order to be an "intending citizen."[30] In July 1987, the INS issued a new form, I-772 "Declaration of Intending Citizen," for this purpose. The executed form must be filed in duplicate with the INS, and a copy of the I-772 showing that it has been received by the INS should be filed with any discrimination charge.

The Office of Special Counsel for Immigration Related Unfair Employment Practices (Office of Special Counsel) announced in March 1988 that the Declaration of Intending Citizen form may be filed after the alleged act of discrimination occurred so long as it is filed prior to the filing of a discrimination charge.[31] This rule was subsequently codified in the Code of Federal Regulations.[32]

Aliens who are legal permanent residents may use Form N-315, which must be filed with a court, instead of the I-772.

**Application for Naturalization.** To maintain the status of intending citizen, a qualifying alien must apply for naturalization within the first six months of becoming eligible to do so. Aliens who were eligible for naturalization at the time IRCA was enacted were required to apply for naturalization within six months of November 6, 1986, *i.e.*, by May 6, 1987.[33] Applicants must actually become naturalized within two years of the date of application, unless they can establish that they are "actively pursuing" naturalization.[34] Time consumed by processing of the application does not count toward the two-year period.[35]

The language of the statute excludes from coverage any eligible alien who does not actually apply for naturalization within the requisite six-month period, even if he or she files an application at a later time. Under the latter circumstances, a literal interpretation of the law appears to be at odds with congressional intent. The purpose of the naturalization provision is to put aliens who have evidenced an intent to become citizens on an equal footing with citizens (subject to the exception enumerated below).[36] The six-month filing deadline is designed to remove from the protection of this section those aliens who do not in fact proceed toward citizenship after six months of being able to do so. But an alien who subsequently files for naturalization clearly intends to become a citizen and thus evidences the requisite intent to be protected against discrimination. Likewise, long-time legal permanent residents who were required to apply for naturalization by May 6, 1987, and did not do so because they were unaware of the requirement or their applications were not accepted for filing should not be excluded from the protections of the law.

### *D. Exceptions*

Section 274B contains several explicit limitations. First, its protections do not apply to "unauthorized aliens." Second, citizenship status discrimination is not a violation of section 274B if such discrimination is required by law, by government contract, or in order to do business with governmental entities.[37] Finally, the IRCA discrimination provisions do not prohibit an employer from preferring a citizen over an alien in hiring, recruitment, or referral (but not discharge) if the two are equally qualified.[38]

• **Unauthorized Aliens.** Section (a)(1) provides that an employer may not engage in prohibited conduct against any individual "other than an unauthorized alien." Unauthorized aliens fall outside the coverage of this provision and cannot invoke its protections.

The term "unauthorized alien" is defined only in the employer sanctions provision.[39] Even though the definition is limited by its own terms to the employer sanctions section, the same

definition will likely be applied to section 274B. Section 274A(h)(3) defines an unauthorized alien as one who at the time of employment is not a legal permanent resident, or authorized to be employed by IRCA, the INA, or the Attorney General. Regulations promulgated pursuant to § 274A set forth those visa categories that authorize employment incident to status and those categories that permit employment only if there has been affirmative grant by the Attorney General.[40]

Employees who qualify under the "grandfather" clause of the employer sanctions section[41] may be able to assert that they are not "unauthorized aliens" and hence are protected by the prohibitions of § 274B. The "grandfather" clause provides that employers cannot be penalized for continuing to employ unauthorized aliens who were hired as of November 6, 1986. Such aliens may therefore be persons who are "authorized to be . . . employed by this Act . . ." within the definition of aliens who are not unauthorized aliens under section 274A(h)(3). The regulations are silent on this issue and do not preclude such an argument.

• **Citizenship Discrimination Required By Law, Regulation or Contract.** Citizenship status discrimination does not constitute a violation of IRCA where such discrimination is *required* by any of the following: law; regulation; executive order; federal, state or local government contract; or an Attorney General determination that such discrimination is essential for an employer to do business with the federal, state or local government.[42]

There are two important limitations to this exception. First, only laws, contracts, or executive orders that *mandate* a preference for citizens constitute a defense. Insofar as permissible, employers must comply with the requirements of section 274B. Only if an employer cannot obey both this section and the requirements of another law, regulation, or executive order regarding the hiring of aliens does the statutory exception apply. The legislative history is clear that Congress intended only that section 274B not preempt federal or state laws that make citizenship a condition of employment. Thus, if a law or contract requires that only citizens be hired for one category of jobs, the employer "may not impose a blanket citizenship requirement for all jobs in its work force."[43]

Second, the exception in section (a)(2)(c) provides a defense only to the provisions of section 274B. Laws, regulations, contracts or executive orders that constitute a defense to a section 274B charge are nonetheless subject to equal protection limitations under the Constitution.[44] They may also be subject to challenge under other federal laws, including 42 U.S.C. § 1981 and Title VII.

While there is some legislative history to support the view that a claimant could challenge the validity of a federal or state law in proceedings under this section,[45] a non-citizen applicant who is denied employment under a provision of state law would better challenge that law directly in federal court.

• **Equally Qualified Citizens.** Section (a)(4) allows an employer to prefer to hire, recruit, or refer a United States citizen or national over an alien "if the two individuals are equally qualified." This provision is not a defense to any other law such as Title VII or Section 1981. The exception allows an employer to prefer United States citizens in a narrow category of cases under carefully prescribed circumstances. The amendment was not intended to eviscerate the protections of this section. As such, the exception is limited in several respects.

*1. **No Exception for Discriminatory Discharge.*** The "equally qualified" exception applies only to hiring, recruitment, or referral. The prohibition in (a)(1) against discriminatory discharge is not affected. An employer may not use citizenship status as a factor in lay-offs or firings.

*2. **Employer Has Burden of Proof.*** Section (a)(4) is a narrowly drawn affirmative defense that must be raised by the employer. The section is structurally parallel to the "bona fide occupational qualification" defense under Title VII,[46] which provides a narrow set of circumstances where otherwise prohibited conduct is permissible. It is well established that employers have the burden of establishing a "BFOQ" defense.[47] Representative Lungren (R-CA), sponsor of the "equally qualified citizen" amendment, recognized that "an employer would have to show that [the citizens] were qualified."[48]

*3. **Individualized Evaluation.*** The exception for equally-qualified citizens requires employers actually to compare individual job applicants and to make a good faith determination that the two (or more) applicants are equally qualified based on legitimate hiring criteria. The language of the exception expressly provides that one *individual* may be preferred over another *individual* if the two are equally qualified.[49] A determination of equal qualifications requires a comparison. Throughout the congressional debates, the scope of the exception was illustrated by examples of employers who were actually confronted with two equally qualified candidates.[50] A post hoc showing of equal qualification, based on the performance of the person hired, would not satisfy the requirements of the statute. An employer seeking to avail itself of this defense must demonstrate that it made an actual comparison at the time of employment and that based on information available at that time, the citizen and non-citizen appeared to be equally qualified based on valid criteria.

The criteria used for determining the qualifications of job applicants are also subject to scrutiny. The measure of whether competing individuals are "equally qualified" must be based on factors that are actually necessary to proper performance of the job and demonstrably job related.

### *E. Proof of Discrimination: Intent v. Effect*

Section 274B does not explicitly state the type of employer conduct that gives rise to liability under this section. Both the text of the statute and the congressional purpose in enacting the section, however, indicate that the standards developed under Title VII were intended to be incorporated. Section 274B was added to IRCA in response to the two-fold congressional concern that employer sanctions would make people who look "foreign" more vulnerable to national origin discrimination, and that the Title VII prohibitions against such discrimination left numerous employers unregulated.[51] *The Joint Anti-Discrimination Hearings*[52] confirm that Congress was particularly concerned with small and seasonal employers that did not come within the jurisdiction of Title VII. Section 274B was drafted, in significant part, to remedy that shortcoming.

Title VII prohibits acts of intentional discrimination as well as acts that have an unintended discriminatory effect. Intentional discrimination ("disparate treatment") requires a showing that the employer intended to treat a person or group of persons less favorably on the

basis of their race, sex, national origin, or other illegitimate consideration.[53] In contrast, if discriminatory effect is alleged ("disparate impact"), an employee need show only that an employment practice or criterion disproportionately disadvantages members of a statutorily protected class. Such "disparate impact" claims depend not on proving that an employer intended to discriminate, but on showing that an employment practice has a statistically significant adverse impact and is not demonstrably necessary for adequate job performance.[54] In a disparate impact claim, the issue is *effect*, not *intent*.

At the time President Reagan signed IRCA into law, he issued a statement asserting that section 274B incorporated only the intentional "disparate treatment" standard of Title VII and not the more potent "disparate impact" basis for liability. The President claimed that the two standards of Title VII were derived from two separate statutory provisions and that the language of section 274B resembled only the statutory basis for outlawing intentional discrimination.[55]

The premise of the President's argument is not supported by Title VII case law. Judicial interpretations of Title VII treat the statute as a whole, and the two courts that have explicitly considered whether the broader "disparate impact" analysis arises only pursuant to one statutory section of Title VII have rejected the President's argument.[56]

The language and structure of section 274B confirm that Congress intended to outlaw more than just intentional discrimination. In setting forth prohibited conduct, the statute never mentions intent.[57] The only court to address the issue to date concluded that section 274B does not require a showing of intent.[58]

The legislative history also confirms what when Congress used the "pattern or practice" language in IRCA, the legislators recognized that the terminology encompassed "disparate impact" discrimination. In the content of employer sanctions, the House Judiciary Committee Report explained that the "pattern or practice" language had received substantial judicial construction, which the Committee expressly intended to follow. The statutes and cases cited by the Committee support imposition of liability on less than a showing of intent and include instances where liability was based on adverse impact.

Despite this clear evidence, the Special Counsel has taken the position that section 274B outlaws only knowing and intentional discrimination. In the preamble to the final rule promulgating the regulations governing discrimination claims, the Special Counsel rejects the disparate impact standard and instead attempts to adopt a purportedly broader interpretation of the intent standard. The preamble explains that "[t]he intent standard makes illegal facially neutral policies that are intended to discriminate . . .," that "[d]iscriminatory intent may be shown by both direct and circumstantial evidence," and that "statistics may be used in appropriate cases to aid in proving discriminatory intent." Specifically, the Special Counsel warns that, as an example adoption of an English-only rule after passage of IRCA that "falls with disproportionate impact on a particular citizenship status group or national origin group" warrants an investigation and "may well give rise to a determination by the Special Counsel of a violation. . . ."[59]

**In many cases, a discrimination complainant may be able to file claims under a combination of state and federal laws or several federal laws. The only overlap that is precluded is pursuing a national origin claim under both Title VII and section 274B.**

In light of the Special Counsel's interpretation, an injured party must allege "knowing and intentional" discrimination whenever there is a basis for so doing, and potential claimants should take an expansive view of the type of conduct that may constitute such discrimination.

### Enforcement

The procedures for enforcing section 274B are administrative. The Act establishes an Office of Special Counsel for Immigration-Related Unfair Employment Practices, which is charged with investigating allegations of discrimination. The law also creates an administrative structure for adjudicating claims and imposing penalties. Resort to the federal courts is available only to appeal (in the courts of appeals) or to enforce (in district court) a final administrative order. In cases where the Special Counsel fails to pursue a claim of discrimination, the statute creates a private right of administrative action. Unlike Title VII, exhaustion of administrative remedies does not vest the federal district courts with original jurisdiction. However, before the Office of Special Counsel was established, a federal district court in Texas held that it had jurisdiction to hear a claim under section 247B and to grant preliminary relief.[60]

#### *A. Filing Charges with the Special Counsel*

Enforcement procedures are initiated by the filing of a "charge" with the Office of Special Counsel.[61] The Special Counsel has issued a special charge that may be used, though its use is optional.[62] However, if the form is not used, all of the information required by the regulations must be provided.[63] A charge may be filed by any person who alleges that he or she is "adversely affected directly" by an unfair immigration-related employment practice, by a person or private organization authorized by an individual to file a charge on his or her behalf, or by an officer of the INS.[64] The regulations designate the person who files the charge, or authorizes it to be filed on his or her behalf, as the "charging party," and the person or entity against whom the charge is filed as the "respondent."[65] The Special Counsel is also empowered to undertake investigations on its own initiative without any charge having been filed.[66]

• **Contents of Charge.** The charge must be executed under oath and contain such information as the Attorney General requires.[67] The information required by regulation includes identifying information about the charging party, the injured party, and the party against whom the charge is made. The regulations further require that the charge set forth whether the basis of the alleged discrimination is citizenship status or national origin, whether a charge has been filed with the EEOC, and whether the injured party is a citizen or alien. Aliens must indicate if they have obtained work authorization, what their immigration status is, and whether they have executed a Declara-

tion of Intending Citizen. In addition, the regulations provide that the charge authorizes the Special Counsel to reveal the identity of the charging party insofar as necessary to carry out the purposes of the law. Finally, if the charging party is not the injured party, the charge must indicate that the charging party is authorized to file the charge. If a charging party's submission is inadequate, the Special Counsel is required to notify the party of the additional information that is required.[68]

• **Statute of Limitations.** A charge must be filed with the Office of Special Counsel within 180 days of the occurrence of the discriminatory act that is the subject of the charge.[69] A charge is deemed filed on the date that it is postmarked.[70]

Submissions filed within 180 days that are deemed inadequate are nonetheless timely filed if the additional information requested by the Special Counsel pursuant to 28 C.F.R. § 44.1(c)(1) is received within the initial 180-day period or within forty-five days of the date on which the charging party received the Special Counsel's request.[71]

If a charge is not filed within the 180-day period, it may nonetheless not be time-barred. Under the principle of equitable tolling, the 180-day period may be tolled under certain circumstances. The analogous Title VII administrative filing period is subject to tolling,[72], and the Office of Special Counsel has indicated that the same standards will be applied in section 274B filings. Circumstances that warrant tolling include ignorance of a new statute, reliance on misinformation from a government agency, and lack of diligence of an attorney.[73]

In a February 1988 letter to the ACLU Immigration Task Force, the Office of Special Counsel stated that the principle of equitable tolling governing Title VII charges is applicable to charges filed pursuant to Section 274B under the principle of *Zipes v. Trans World Airlines, Inc.*:

> This Office does not dispute the applicability of the equitable tolling principles to the waiving of the requirement that a charge be received by the Office of Special Counsel within 180 days of the alleged discrimination, *see* 8 U.S.C. § 1324b(d)(3) and 52 Fed. Reg. 37410 (October 10, 1987) (to be codified at 28 C.F.R. § 44.0(b)). If a sufficient factual basis exists, this Office would maintain that the 180 days be equitably tolled.[74]

• **Election of Remedies: No Overlap with Title VII.** Section 274B prohibits a complainant from pursuing a *national origin* claim under both Title VII and section 274B. A complainant may not file a charge with the Special Counsel if a national origin charge "with respect to that practice based on the same set of facts" has been filed with the EEOC. The only exception is if the charge is dismissed as being outside the scope of Title VII. Likewise, if a national origin charge has been filed with the Special Counsel, such a charge based on the same facts cannot be filed with the EEOC.[75]

Given the complementary structure of Title VII and section 274B, an incorrect filing under one statute should toll the statute of limitations for filing under the other.[76] This is particularly important since Title VII requires filing a charge with the EEOC within 180 days of the discriminatory act (or within 300 days if the filing is with a state deferral agency).

In April 1988, the Office of Special Counsel and the EEOC entered into an Interim Agreement appointing each other as their respective agents "for the receipt of charges and satisfaction of the time limits for filing of charges." Thus, timely charges that are filed with the wrong federal agency will be preserved. The Interim Agreement remains in effect pending promulgation of a formal Memorandum of Understanding between the two agencies.

• **Notice to Employer.** The Special Counsel is required to serve a notice of the completed charge on the respondent within ten days of filing. The notice must include date, place, and circumstances of the alleged violation.[77]

### *B. Investigation and Bringing of Administrative Complaints*

After a charge is filed with the Special Counsel, that office must conduct an investigation within 120 days of receipt.[78] The Special Counsel may propound interrogatories, requests for production of documents, and requests for admissions and shall have reasonable access to examine the books, records, accounts and other sources of information relating to any person or entity being investigated.[79]

Within the 120-day period, the Special Counsel may bring a "complaint" before an Administrative Law Judge (ALJ) alleging unlawful discrimination by the respondent.[80] Alternatively, the Special Counsel may issue a letter of determination notifying the charging party that there is no reasonable cause to believe the charge is true and that an administrative "complaint" will not be brought.[81] Upon receipt of such a letter, or if the 120-day investigation period has expired, the charging party may bring a "complaint" on his or her own directly before the ALJ.[82]

• **Private Right of Action.** The statute is silent as to the time limit within which a private complaint must be filed, but the regulations specify that a private claimant has ninety days after the expiration of the 120-day investigation period to bring a complaint before an ALJ.[83] This period too may be subject to equitable tolling, though the standard may be stricter than for the filing of an administrative charge.[84] If the Special Counsel issues a letter of determination that no complaint will be brought, the charging party still has up to ninety days after the expiration of the 120-day period to bring a complaint.[85]

If the Special Counsel fails to bring a complaint within the initial 120-day period, it may nonetheless do so anytime within the subsequent ninety-day period. If the charging party has filed its own complaint with the ALJ, the Special Counsel may seek to intervene.[86]

• **Nature of Claims.** The statute provides that only claims that allege "knowing and intentional discriminatory activity or a pattern and practice of discriminatory activity" can be the basis for a private action. There is no explicit requirement that a pattern or practice be of "intentional" discrimination.[87] The regulations do not address this issue in the private right of action context since the regulations (incorrectly) predicate at the outset that section 274B prohibits only "knowing and intentional discriminatory activity."[88] As noted above, Congress intended section 274B to outlaw "disparate impact" as well as intentional discrimination, and the term "pattern or practice" encompasses more employer actions than those which constitute "knowing and intentional" discrimination.

In cases where the Special Counsel undertook an investigation on its own initiative without any charge having been filed, the Special Counsel may bring a complaint directly before an ALJ within 180 days of the occurrence of an act of discrimination.[89]

### *C. Hearing Procedures*

Specific regulations governing hearings to enforce employer sanctions and to adjudicate claims of employment discrimination were promulgated in the form of an interim final rule under the authorization of the Executive Office for Immigration Review on November 24, 1987.[90] Insofar as particular situations are not covered, the Federal Rules of Civil Procedure are to be applied.

### *D. Enforcement Orders*

Upon finding that an employer has engaged in an unfair immigration-related employment practice, the ALJ must state his or her findings and issue a cease and desist order.[91] In addition, the ALJ may order any of the following: retention for up to three years of the name and address of all job applicants who apply in person or in writing; hiring individuals adversely affected; awarding of back pay; for first offenders payment of a civil penalty of up to $1,000 per individual discriminated against; and compliance with the paperwork/verification requirements of the employer sanctions provision[92] for a period of up to three years.[93]

• **Limitations.** Hiring and back pay cannot be ordered if the claimant was refused employment for any reason other then discrimination on the basis of national origin or citizenship status. In addition, back pay cannot accrue for longer than two years prior to the filing of a charge and must be reduced by actual interim earnings or by amounts "earnable with reasonable diligence."[94]

In the content of penalties and remedial orders, divisions, or subsidiaries of a parent company are treated as separate entities if they are physically separate subdivisions not under the control of another entity and if they maintain separate hiring practices and policies.[95]

• **District Court Enforcement.** A final order of the ALJ is enforceable in federal district court.[96] A petition for enforcement may be filed by the Special Counsel or by the individual claimant if the Special Counsel does not act. Jurisdiction lies with the district court where the respondent resides or transacts business or where the violation occurred.[97] The underlying order of the ALJ is not reviewable in an enforcement proceeding.[98]

### *E. Attorneys' Fees*

Section 274B provides that a prevailing party (other than the United States) may be awarded a reasonable attorney's fee if the losing party's argument "is without reasonable foundation in law and fact."[99] Attorney's fees may be awarded to the prevailing party by the ALJ for time expended on the administrative proceeding and by the federal district court or court of appeals for time expended on judicial proceedings obtaining enforcement or appellate review. The statute prohibits payment to the United States, so fees cannot be awarded to the Special Counsel.

A party is eligible for fees only if it establishes both that it prevailed and that the losing party's argument was without reasonable foundation in law and fact. The latter requirement adds a significant hurdle to the award of fees to prevailing plaintiffs. A victim of discrimination could prevail on his or her claim, either before the ALJ or an appeal, yet not receive an award of fees.

The restrictive fees language of section 274B contrasts with the standard established under Title VII. A prevailing Title VII plaintiff is presumptively entitled to attorney's fees, while prevailing defendants are entitled to fees only where the plaintiff's case was "frivolous, unreasonable, or groundless . . . [or] brought or continued . . . in bad faith."[100] The unequal standards for plaintiffs and defendants in Title VII cases evidence the congressional desire to encourage plaintiffs to pursue claims without the fear of an adverse fee award. The absence of a presumption in favor of plaintiffs under section 274B will discourage the filing of valid claims, particularly in the early years of the Act, when the legal standards are not clearly articulated.

The section 274B statutory language raises the prospect that plaintiffs and defendants will be entitled to fees on the same basis if they prevail. However, courts may decide that defendants will have to qualify under the higher *Christiansburg* standard in order to be awarded fees.

### *F. Appeals*

Finals orders of the ALJ are reviewable by the federal court of appeals in the circuit in which the violation is alleged to have occurred or where the employer resides or transacts business. Petitions for review must be filed within sixty days of the entry of the final order. The act does not make provision for any administrative or Attorney General review of ALJ decisions.[101]

## GAO Reports and Termination Provision

The Act requires the Comptroller General to report to the Congress on the effects of the employer sanctions and anti-discrimination provisions.[102] The GAO reports are due each year for three years on the anniversary of the date of enactment of IRCA. The reports must include an evaluation of whether employer sanctions have resulted in a "pattern of discrimination" on the basis of national origin against "other than unauthorized aliens,"[103] or in a pattern of discrimination against citizens, nationals or "eligible workers seeking employment."[104]

The employer sanctions provision will be repealed if the third and final GAO report finds that sanctions have caused a "widespread pattern of discrimination" against citizens, nationals, or "eligible workers seeking employment" and if Congress passes a joint resolution approving the report.[105] The anti-discrimination provision will automatically lose its force if employer sanctions are repealed for any reason.[106] In addition, section 274B will be repealed if the third and final GAO report finds no significant discrimination or that employer sanctions have created an unreasonable burden on employers and if Congress approves the report.[107]

It bears emphasis that the Comptroller General's reporting duty applies to discrimination against any aliens authorized to work, whether or not they are protected by the anti-discrimination provision of IRCA. Any evidence of discrimination against non-citizens who are entitled to work in the United States, whether the discrimination is on the basis of national origin or alienage, and whether that discrimination is prohibited by Title VII, by IRCA, by other state or federal law, or by no law at all, is relevant to the GAO's reporting obligation and should be collected and reported to the GAO.

The first GAO report, titled *Immigration Reform: Status of Implementation Employer Sanctions After One Year* (GAO/GGD 88-14) was issued in November 1987. It reported that sixty-seven charges alleging immigration-related employment discrimination claims had

been filed with federal agencies and thirty-four charges had been filed with state and local government agencies. The report recognized that it was too early to draw any conclusions. The second GAO report, *Immigration Reform: Status of Implementing Employer Sanctions After Second Year* (GAO/GGD-89-16, November 1988) found that a significant number of employers had adopted unlawful employment practices since the enactment of IRCA. These practices included asking only "foreign" looking or sounding job applicants for documentation and adopting policies of hiring only citizens. The report declined to conclude that these practices constituted discrimination from the implementation of employer sanctions.

## Other Federal Laws: Title VII and Section 1981

The protections afforded by other federal laws prohibiting employment discrimination are beyond the scope of this paper. However, a few basic points are essential to a proper understanding of the scope of section 274B.

First, the exceptions to section 274B are affirmative defenses or jurisdictional prerequisites to liability under that statute. They are not legislative authorization to engage in discrimination. Second, conduct that is exempted from liability under Section 274B may nonetheless constitute a violation of other federal laws including Title VII of the 1964 Civil Rights Act, section 1981, and the Equal Protection Clause of the Constitution.

### *A. Title VII*

Title VII prohibits employment discrimination on the basis of race and national origin (and several other grounds).[108] Discrimination and the basis of citizenship status is not explicitly covered, but is prohibited if it causes —intentionally or unintentionally—national origin discrimination.[109] Title VII applies to employers that have fifteen or more employees who work twenty or more weeks a year.[110]

The prohibitions against discrimination imposed by Title VII are particularly significant because lawful immigration status is not a prerequisite to invoking that law's protections. The same is true of workplace protections under the National Labor Relations Act, the Fair Labor Standards Act, the Occupational Health and Safety Act, and other similar laws.

Prior to 1986, a number of courts, including the Supreme Court, had held that immigration status is not determinative of an employee's right to invoke the protections of federal labor laws.[111] Since IRCA's enactment in 1986, the courts have continued to enforce the same principle.[112] Whether a particular remedy (*e.g.*, reinstatement, back pay, damages, etc.) is ordered may, however, depend upon the immigration status of the affected employee, including whether s/he qualifies as a "grandfather" employee under IRCA.

In practice, Title VII's prohibitions against an employment practice or procedure that has a "disparate impact" on the basis of race or national origin can be invoked by undocumented or "unauthorized" workers who would not be able to state a discrimination claim under IRCA. For example, if the discharge of all (or some) grandfathered employees has a disparate impact (or constitutes disparate treatment), Title VII will be triggered.[113] The employer will not be able to invoke IRCA as a defense (under the "business necessity" doctrine), since documenting or discharging grandfathered workers is not required by IRCA, and an immigration-related employment practice will not qualify as a business necessity if it is not mandated by IRCA. The same theory of liability would apply to any employment practice not required by IRCA (*i.e.*, where the employer retains discretion) if the practice results in unlawful disparate impact, even if the victims are undocumented workers.

### *B. Section 1981*

Section 1981, one of several post-Civil War civil rights statutes, prohibits private employers of any size from treating any person less favorably than a "white citizen." Because of its language and the absence of a state action requirement, section 1981 applies to any private contractual relationship including, but not limited to, employment.[114] For example, bank loans, insurance policies and house sales all come within the purview of section 1981. 42 U.S.C. § 1981 provides in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .

As interpreted by the Supreme Court, the law clearly prohibits alienage discrimination by governmental entities.[115] Section 1981's applicability to private employers who discriminate on the basis of alienage is less clear and is currently the subject of litigation.[116] For liability under Section 1981, dis-criminatory intent must be proven.[117]

### *C. Equal Protection*

The Equal Protection Clause of the fourteenth Amendment to the U.S. Constitution severely limits the power of state and local governments to discriminate on the basis of alienage in employment.[118] It is permissible only in a narrow category of jobs.[119] But equal protection imposes few limits on the power of Congress or the President to restrict employment by the federal government to only citizens.[120]

In some jurisdictions, there are also state and local statutes prohibiting discrimination on the basis of national origin, alienage, or citizenship status. Similarly, collective bargaining agreements and general state laws limiting an employer's right to discharge workers unilaterally may afford employees protection against discharge or discriminatory treatment. As with federal laws, "unauthorized" aliens may be protected by local laws affording workplace rights or prohibiting discrimination on the basis of alienage. Only if such laws are limited by their own terms, are in direct conflict with IRCA, or are preempted by other federal laws would they fail to protect all employees.

In many cases, a discrimination complainant may be able to file claims under a combination of state and federal laws or several federal laws. The only overlap that is precluded is pursuing a national origin claim under both Title VII and section 274B.[121]

## ENDNOTES

[1]42 U.S.C. § 2000e *et seq.* (1988).

[2]52 Fed. Reg. 37,402 (1987).

[3]To be codified at 28 C.F.R. § 68 *et seq.*

[4]Unless otherwise noted, all statutory citations are to the Immigration and Nationality Act (INA) section 274B, 8 U.S.C. § 1324B (1988).

[5]Statement of Rep. Erlenborn (R-Ill.), 130 CONG. REC. 4563 (daily ed. June 12, 1984) ("There is no definition . . . as to who a

person or other entity is . . . it covers everyone. There are no exceptions.")

[6]INA section (a)(2)(A); 28 C.F.R. § 44.200(b)(l)(i) (1989).

[7]8 C.F.R. § 274a.1(f) (1989).

[8]*See, e.g.*, Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir. 1982); Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979). *See generally* Hishon v. King & Spalding, 467 U.S. 69 (1984).

[9]*See generally* Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979).

[10]*See* Thurber v. Jack Reilly's, Inc., 717 F.2d 633 (1st Cir. 1983), *cert. denied*, 466 U.S. 904 (1984).

[11]52 Fed. Reg. 37,402 (1987).

[12]8 C.F.R. § 274a.1(e) (1989).

[13]*See e.g.*, Irving v. Dubuque Packing Co., 689 F.2d 170 (10th Cir. 1982); Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981); Meyer v. Brown & Root Constr. Co, 661 F.2d 369 (5th Cir. 1981); Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981).

[14]*See Joint House-Senate Hearings on Anti-Discrimination Provision of H.R. 3080*, 99th Cong., 1st Sess. 95101 (Oct. 9, 1985) (hereinafter *Joint Anti-Discrimination Hearings*).

[15]28 C.F.R. § 44.201 (1989).

[16]*See* 8 C.F.R. § 274a.12 (1989).

[17]414 U.S. 86 (1973).

[18]*Id.* at 88-89.

[19]29 C.F.R. § 1601.1 (1989).

[20]H.R. Conf. Rep. No. 1000, 99th Cong., 1st Sess. 87 (1985).

[21]*See* INA section (a)(2)(B).

[22]*See* 52 Fed. Reg. 37,402 (1987).

[23]8 U.S.C. § 1101(a)(22) (1989).

[24]*See* INA section (a)(3)(B).

[25]INA section 245A; 8 U.S.C. § 1255a (1988).

[26]8 U.S.C. § 1157 (1988).

[27]8 U.S.C. § 1158 (1988).

[28]53 Fed. Reg. 10,338 (1988) (to be codified at 28 C.F.R. § 44.101(c)(2)(ii)).

[29]*See* 8 C.F.R. § 274a.12 (1989).

[30]*See* 28 C.F.R. § 44.101(c) (1989).

[31]53 Fed. Reg. 9715 (1988).

[32]28 C.F.R. § 44.101(c)(2)(ii) (1989).

[33]*See* INA section (a)(3)(B)(ii)(I).

[34]*See* INA section (a)(3)(B)(ii)(II).

[35]*See generally* 28 C.F.R. § 44.101(c)(3) & (4) (1989).

[36]*See* 132 CONG. REC. H9771 (daily ed. Oct. 9, 1986) ("[Aliens] only get the protection of this [citizenship status provision] up to the point where they can become citizens. If they choose not to become citizens, no protection.").

[37]*See* INA section (a)(2)(C); 28 C.F.R. § 44.200(b)(1)(iii) (1989).

[38]*See* INA section (a)(4); 28 C.F.R. § 44.200(b)(2) (1989).

[39]*See* INA section 274A(b)(3).

[40]8 U.S.C. § 274a.12 (1989).

[41]8 U.S.C. § 101(a)(3) (1989).

[42]*See* INA § (a)(2)(C); 28 C.F.R. § 44.200(b)(iii) (1989).

[43]52 Fed. Reg. 37,403 (1987).

[44]*See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432 (1982); Ambach v. Norwick, 441 U.S. 68 (1979); Nyquist v. Mauclet, 432 U.S. 1 (1977); *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973).

[45]*See* 130 CONG. REC. H5643 (daily ed. June 12, 1984).

[46]42 U.S.C. § 2000e-2(e) (1988).

[47]*See, e.g.*, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

[48]132 CONG. REC. H9697-98 (daily ed., Oct. 9, 1986).

[49]*See* 28 C.F.R. § 44.200(b)(2) (1989).

[50]*See* 132 Cong. Rec. H9767 (daily ed. Oct. 9, 1986) (Rep. Lungren (R-Cal.): "If you have as an employer a citizen and non-citizen in front of you, equally qualified, and you are trying to make a decision"; Rep. Frank (D-Mass.): "an employer who is faced with people of equal qualifications."

[51]H.R. Conf. Rep. No. 1000, 99th Cong, 1st Sess. 87 (1985).

[52]*See id.*

[53]*See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[54]Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[55]*Compare* 42 U.S.C. § 2000e-2(a)(1) (1988) *with* § 2000e-2(a)(2) (1988).

[56]*See* Colby v. J.C. Penney Co., 811 F.2d 1119 (7th Cir. 1987) (Posner, J.); Wambheim v. J.C. Penney Co., 705 F.2d 1492 (9th Cir. 1983).

[57]*See* INA section (a)(1).

[58]*See* United Latin American Citizens v. Pasadena Ind. School Dist., 662 F. Supp. 443 (S.D. Tex. 1987). *See generally* EEOC Policy Statement (Feb. 26, 1987).

[59]52 Fed. Reg. 37404-05 (Oct. 6, 1987).

[60]League of United Latin American Citizens v. Pasadena School Dist., 672 F. Supp 280 (S.D. Tex. 1987).

[61]28 C.F.R. § 44.101(a) (1989).

[62]52 Fed. Reg. 37.407 (Oct. 6, 1987).

[63]*See* 28 C.F.R. § 44.101(a) (1989).

[64]*See* INA section (b)(1); 28 C.F.R. § 44.101(b) (1989).

[65]28 C.F.R. § 44.101(b) & (f) (1989).

[66]28 C.F.R. § 44.304 (1989).

[67]*See* INA section (b)(1); 28 C.F.R. § 44.101(a) (1989).

[68]28 C.F.R. § 44.301(c)(1) (1989).

[69]*See* INA § (d)(3).

[70]28 C.F.R. § 44.300(b) (1989).

[71]28 C.F.R. § 44.301(d)(2)(ii) (1989).

[72]*See* Zipes v. Trans World Airlines, 455 U.S. 385 (1982).

[73]*See generally* Miller v. Marsh, 766 F.2d 490 (11th Cir. 1985); Jennings v. American Postal Workers Union, 672 F.2d 712 (8th Cir. 1982); Antonopulos v. Aerojet-General Corp., 295 F. Supp 1390 (E.D. Ga. 1968); Georgia Power Co. v. EEOC, 295 F. Supp. 950 (N.D. Ga. 1968).

[74]65 Interpretive Releases 847-48 (Aug. 22, 1988).

[75]*See* INA section (b)(2).

[76]*See* Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982).

[77]*See* INA section (b)(1); 28 C.F.R. § 44.301(e) (1989).

[78]*See* INA section (d)(1).

[79]28 C.F.R. § 44.302(a) & (b) (1989).

[80]28 C.F.R. §§ 44.303(a) & 44.101(d) (1989).

[81]28 C.F.R. § 44.303(b) (1989).

[82]28 C.F.R. § 44.303(c)(1) (1989); *see also* INA section 274B(d)(2).

[83]28 C.F.R. §§ 44.303(c)(1)& (2) (1989).

[84]*See, e.g.*, Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1982) (ninety-day period for filing Title VII complaint in district court may be tolled); Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) (same).

[85]28 C.F.R. § 44.303(c)(2) (1989).

[86]28 C.F.R. § 33.403(d) (1989).

[87]*See* INA section (d)(2).

[88]28 C.F.R. § 44.200(a) (1989).

[89]*See* INA section (d)(1); 28 C.F.R. § 44.304 (1989).

[90]52 Fed. Reg. 44,972 (1987) (to be codified at 28 C.F.R. § 66 *et seq.*).

[91]*See* INA section (g)(2)(A).

[92]INA section 274A(b).

[93]*See* INA section (g)(2)(B).

[94]*See* INA section (g)(2)(C).

[95]*See* INA section (g)(2)(D).

[96]*See* INA section (j).

[97]*See* INA section (j)(1).

[98]*See* INA section (j)(3).

[99]*See* INA section (h) & (j)(4).

[100]Christiansburg Garment Co. V. EEOC, 434 U.S. 412, 422 (1978).

[101]*See* INA section (i).

[102]INA section 274A(j).

[103]INA section 274A(j)(2).

[104]INA section 274A(j)(i)(B).

[105]INA section 274A(l)(i)(A) & (B).

[106]*See* INA section 274A(k)(1).

[107]*See* INA section 274A(k)(2).

[108]42 U.S.C. § 2000e-2(a)(1) (1988).

[109]Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

[110]42 U.S.C. § 2000e(b) (1988). For a general discussion of the application of Title VII to immigration-related employment discrimination, *see* EEOC Release and Policy Statement, adopted Feb. 26, 1987.

[111]*See* Sure-Tan v. NLRB, 467 U.S. 883 (1984). *See also* Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d 705 (9th Cir. 1986).

[112]*See, e.g.*, NLRB v. Ashkenazy Property Mgmt. Corp., 817 F.2d 75 (9th Cir. 1987); Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988); Rios v. Steam Fitters Local 638, 860 F.2d 1168 (2d Cir. 1988). *See also* Memorandum of NLRB General Counsel No. 88-9 (Sept. 1, 1988).

[113]*See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (employment practices or procedures that have a disparate impact on the basis of race or national origin are unlawful unless justified by "business necessity"); Dothard v. Rawlinson, 433 U.S. 321 (1977) (same).

[114]Runyon v. McCrary, 427 U.S. 160 (1976). *But see* Patterson v. McLean Credit Union, 805 F.2d 1143 (4th Cir. 1986), *modified*, 109 S. Ct. 2363 (1959).

[115]*See, e.g.*, Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

[116]*See generally* Bhandari v. First Nat'l Bank of Commerce, 829 F.2d 1343 (5th Cir. 1987), *petition for rehearing denied*, 110 S. Ct. 22 (1989).

[117]General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982).

[118]Sugarman v. Dougall, 413 U.S. 634 (1973); *In re* Griffiths, 413 U.S. 717 (1973); Truax v. Raich, 239 U.S. 33 (1915). *See also* Bernal v. Fainter, 467 U.S. 216 (1984).

[119]*See* Cabell v. Chavez-Salido, 454 U.S. 432 (1982); Ambach v. Norwick, 441 U.S. 68 (1979); Foley v. Connelie, 435 U.S. 291 (1978).

[120]*See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

[121]8 U.S.C. § 1324b(a)(2)(B) (1988).

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