
DOJ Civil Rights Division Intensifies Efforts to Investigate Discrimination Against US Workers

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On October 11, 2017, the Department of Justice's (DOJ) Civil Rights Division, Immigrant and Employee Rights Section (IER) and the Department of State's Bureau of Consular Affairs announced a [partnership](#) aimed at protecting US workers from discrimination and combatting fraud by employers that misuse visas. Under a new memorandum of understanding, IER and the Bureau of Consular Affairs have agreed to share information about employers that engage in unlawful discrimination or fraud, or make other misrepresentations in their use of employment-based visas.

This partnership follows the February 2017 launch of IER's "Protecting U.S. Workers Initiative," which aims to target, investigate and bring enforcement actions against companies alleged to discriminate against US workers in favor of foreign visa workers.

IER, formerly known as the Office of Special Counsel for Immigration-Related Unfair Employment Practices, is the section within the Civil Rights Division responsible for enforcing the anti-discrimination provision of the Immigration and Nationality Act (INA). The INA's anti-discrimination provision prohibits, among other things, citizenship and national origin discrimination in hiring, firing or recruiting. IER has interpreted this provision as prohibiting employers from intentionally discriminating against US workers in hiring, firing or recruiting on the basis of citizenship status or national origin, or from "otherwise favor[ing] the employment of temporary foreign workers over available, qualified U.S. workers."

IER filed its first lawsuit under the Protecting U.S. Workers Initiative on September 28, 2017. In that suit, DOJ alleges that [Crop Production Services, Inc.](#), imposed more burdensome hiring requirements on US citizens than it did on H-2A visa workers—foreign agricultural workers hired to work seasonally—in order to discourage US citizens from working at their El Campo, Texas, facility. For example, the DOJ alleges that Crop Production had a policy of requiring background checks and drug testing for applicants who received an offer of employment. DOJ alleges that, in practice, US citizens had to complete the background check and drug test before starting work, while H-2A visa workers did not. DOJ also alleges that Crop Production refused to consider a US citizen with limited

English proficiency for employment, but hired H-2A workers who could not speak English. DOJ alleges that all of Crop Production's 15 seasonal jobs went to H-2A visa workers.

Implications for Employers

Since the launch of the Protecting U.S. Workers Initiative, IER has opened 29 investigations of potential employer discrimination against US workers. The new partnership between IER and the Bureau of Consular Affairs cements the government's focus on pursuing these types of investigations.

In light of this partnership, IER's initiative and the President's April 18, 2017, "[Buy American and Hire American](#)" executive order, the DOJ is likely to continue to pursue investigations of employers who hire significant numbers of foreign visa workers. Given this investigative climate, companies should take seriously any inquiries or information requests from IER. In addition, companies that hire significant numbers of foreign workers should consider ways to mitigate risk in this area. Companies may consider taking the following steps:

Review current hiring, firing or recruiting practices, and consider implementing formal policies that clearly prohibit citizenship and national origin discrimination, including against US workers.

Provide training for managers, including hiring managers, on preventing discrimination on the basis of citizenship status or national origin.

WilmerHale is currently assisting clients in their response to IER investigations of potential discrimination on the basis of citizenship status and/or national origin. We also conduct reviews of our clients' internal hiring, firing, and recruiting policies and responses to specific incidents to ensure compliance with federal anti-discrimination statutes, including the anti-discrimination provision of the INA. We will continue to monitor the developments at IER for relevance to our client matters.

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