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Employers as Junior Immigration Inspectors: The Impact of the 1986 Immigration Reform and Control Act

The Immigration Reform and Control Act of 1986 (IRCA), also known as the Simpson-Rodino Act,¹ is the most significant piece of immigration legislation in over thirty years. It radically revamps this already complicated area of law. Its impact on employers is particularly great, and can be seen in three ways. First, fines of up to \$10,000 and even jail sentences can be imposed on businesses that knowingly hire undocumented aliens. Second, every employer must now verify and maintain records on the immigration and citizenship status of each prospective employee, even if the applicant is a U.S. citizen. Third, antidiscrimination provisions prohibit all but the smallest employers from discriminating in hiring or firing on the basis of an individual's national origin or citizenship status. Persons who feel they have been discriminated against may initiate an action against the employer.

These provisions create major new responsibilities for businesses, and in effect deputize them as junior immigration inspectors. Employers must now provide the sort of enforcement check that the woefully undermanned Immigration and Naturalization Service (INS) is unable to perform. Lawyers will feel these duties and prohibitions doubly: first in advising their

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1. Pub. L. No. 99-603, 1986 U.S. CODE CONG. & ADMIN. NEWS (10A).

business clients, and second in having to comply themselves, in their own role as employers.

This article analyzes the employer sanctions and antidiscrimination provisions of the Simpson-Rodino Act. The article points out ambiguities, gaps, and unanswered questions in the statute and supplementing regulations, and provides practical pointers for attorneys, businesses, and individuals.

I. Employer Sanctions

A. OVERVIEW

The Simpson-Rodino Act for the first time imposes civil and criminal penalties on employers who knowingly hire, recruit, or refer aliens who are not authorized to work. Employers may lawfully continue to employ unauthorized aliens hired before November 6, 1986, however. The sanctions apply to all employers, no matter how small. The civil fines range from \$250 to \$10,000 per alien; criminal penalties and injunctive relief are possible for habitual violators. A separate provision penalizes everyone who fails to keep certain records concerning their hiring, recruiting, or referring practices, even if they hire only U.S. citizens. These paperwork penalties range from \$100 to \$1,000 per applicant.

Under the statute employer sanctions were to take effect June 1, 1987. The INS administratively delayed enforcement, however, for three months, until September 1, 1987. Until May 31, 1988, only warning citations will be issued for first violations.

B. SCOPE OF SANCTIONS

Generally. The new law creates a new section 274A of the Immigration and Nationality Act (INA).² Section 274A sets forth two separate types of sanctions. First, it makes it unlawful for an individual or company to hire, recruit, or refer an alien for a fee after November 6, 1986 if the employer knows the alien is unauthorized to work.³ This prohibition also applies to continuing employment of aliens hired after the date of enactment who originally were authorized to work but who subsequently became unauthorized.⁴ Second, the new section also prohibits an individual or company from hiring, recruiting or referring any individual—alien or

2. *Id.* § 101(a) (enacting Immigration and Nationality Act § 274A) [hereinafter new INA § ____].

3. New INA § 274A(a)(1).

4. New INA § 274A(a)(1).

U.S. citizen—without first examining certain documents establishing the applicant's identity and authorization to work.⁵

The knowing requirement. The sanctions apply only to "knowing" violations.⁶ This is potentially the most important word in the entire employers sanctions portion of the new statute. Neither the statute nor the INS's implementing regulations define "knowing," but presumably the standard requirement of subjective, actual knowledge, rather than an objective, "reason to know" test, will apply. Thus, employers and recruiting and referring agencies should not be subject to sanctions if they have reason to suspect, but do not actually know, that the alien is not authorized to work.

In some cases employers, recruiters, or referrers may have reservations about an alien's authorization to work, based on statements or additional documentation volunteered by the applicant. As long as the employer, recruiter, or referrer complies in good faith with the verification procedures of the new Act, however, they should be protected.⁷ Moreover, the statute expressly states that an employer or other entity does not have to ask for other documentation besides that required by the law.⁸ The verification procedures are discussed in greater detail below.

"Unauthorized alien." The sanctions apply only to hiring, continuing to employ, recruiting, or referring an "unauthorized alien."⁹ The statute defines this term to mean (a) an alien not lawfully admitted for permanent residence or (b) not authorized to work, either through the INA or by the INS.¹⁰ This definition should pose no problems for immigration practitioners, who are used to the complexities of work authorization. However, it will require educating employers and employment agencies. For example, an alien who enters the U.S. on an H-1 nonimmigrant visa as a person of distinguished merit and ability is authorized to work only for the particular employer for which the H-1 visa was approved. If that alien applies for another job, and presents a valid driver's license and Social Security card to the second employer, that employer will have no reason to know that the alien is not authorized to work that second job.

The INS's implementing regulations list twenty-five categories of aliens who are deemed to have work authorization through their immigration status.¹¹ The list includes lawful permanent resident aliens, temporary

5. New INA § 274A(b).

6. New INA § 274A(a)(1)(A), 274A(a)(2).

7. See new INA § 274A(a)(3) (defense for good faith compliance with § 274A(b)).

8. New INA § 274A(b)(1)(A).

9. New INA § 274A(h)(3).

10. *Id.*

11. 52 Fed. Reg. 16,226-27 (May 1, 1987) (new 8 C.F.R. § 274a.12(a), (b)). The INS regulations are analyzed and reproduced in 64 *Interpreter Releases* 517-63 (1987).

workers in the U.S. on L-1 intracompany transferee visas, refugees, asylees, and individuals granted extended voluntary departure status. Fifteen other categories of aliens have to apply for work authorization, including spouses and unmarried sons and daughters of principal aliens who have received certain nonimmigrant visas.¹² Asylum applicants, parolees, suspension of deportation applicants, and individuals granted voluntary departure are also included in this latter category.¹³

The INS has also agreed to grant temporary work authorization to legalization applicants. The Service proposed this policy in its proposed regulations,¹⁴ but then agreed to begin immediately the work permits as a partial settlement in a class action challenging various aspects of the 1986 immigration law.¹⁵

Under the terms of the settlement, undocumented aliens seeking employment may sign a simple declaration that they believe they qualify for legalization and intend to apply for it. The alien does not have to present any documentation. This statement authorizes the alien to work. Employers may then retain this statement as legal protection against employer sanctions. The self-issuing work permits are valid until September 1, 1987.¹⁶ It is anticipated that by that date such aliens will either receive a decision on their legalization applications or else will receive an extension of their temporary work authorization.

Small employers, part-time and temporary help, and casual hires. All employers, no matter how small, are potentially subject to employer sanctions. Thus, for example, a family who knowingly hires an unauthorized alien as a maid, or an attorney who hires an undocumented alien as a secretary, theoretically could face a \$2,000 fine. Similarly, the definition of "unauthorized alien" is not limited to full-time employment. Employers, recruiters, or referrers who deal with unauthorized aliens for part-time or temporary positions are also potentially subject to sanctions.

The conference report, however, states that Congress expects the INS "to target its enforcement resources on repeat offenders" and to consider "the size of the employer."¹⁷ INS officials have said they will not harass families hiring household workers.¹⁸ Thus, the longstanding practice of

12. 52 Fed. Reg. 16,227-28 (May 1, 1987) (new 8 C.F.R. § 274a.12(c)).

13. *Id.*

14. 52 Fed. Reg. 8767 (March 19, 1987) (proposed 8 C.F.R. § 274a.12(a)(8)).

15. *Catholic Social Services v. Meese*, No. CIV-S-86-1343-LKK (E.D. Cal. March 23, 1987), reported in 64 *Interpreter Releases* 376-77, 437-38, 446-57 (1987). A notice containing the terms of the settlement appears in 52 Fed. Reg. 11,567-75 (April 9, 1987).

16. See 52 Fed. Reg. 11,568 (April 9, 1987); see also 52 Fed. Reg. 16,221, 16,226 (May 1, 1987) (new 8 C.F.R. §§ 274a.2(a), 274a.11).

17. H.R. CONF. REP. NO. 1000, 99th Cong., 2d Sess. 86 (1986) [hereinafter H.R. CONF. REP. NO. 1000].

18. N.Y. Times, Oct. 26, 1986, at A16, col. 1.

hiring unauthorized aliens as domestic help will probably continue unabated. As a practical matter, other persons and entities who hire, recruit, or refer aliens only for part-time or temporary jobs are also unlikely to face an INS investigation, unless their violations are flagrant and habitual.

The House Judiciary Committee report on the bill also states that it does not intend employer sanctions to apply to "casual hires."¹⁹ The Committee defined that phrase as a situation where no ongoing employer/employee relationship exists.²⁰ Thus, Congress intended that a person should not be penalized for knowingly hiring an unauthorized alien as a babysitter, carpenter, or temporary secretary for one job or one day, or for failing to verify the citizenship status of such an individual.

The INS, however, defines "casual employment" in its regulations much more restrictively. Under the Service's view, only individuals who provide "domestic service in a private home that is sporadic, irregular, or intermittent" qualify as casual hires.²¹ Thus, a family who hired a maid one time to help out at a party would not have to verify the maid's work authorization or worry about violating the sanctions provisions of the new law. But the same family who hires a carpenter for one job, or a law firm who hires a temporary secretary directly for one day, could not claim the "casual employment" exception. The carpenter's and secretary's work are both sporadic, but do not involve domestic service. Moreover, the secretary works outside a private home, an additional reason it would not be considered "casual." This definition fails to accord with the realities of the workplace.

Recruiting. Employer sanctions can be imposed on persons or entities who "hire, . . . recruit or refer for a fee" an unauthorized alien.²² Employment agencies and headhunters, who are paid for their recruiting efforts, clearly fall within the scope of the section. The statute is not as clear as it could be, however, about whether recruiting without a fee is also included. For example, suppose a law firm recruits new associates by conducting interviews on law school campuses. If the firm learns that an applicant is not authorized to work, continues to recruit him, but ultimately decides not to hire him, is the firm still potentially liable for having knowingly recruited an unauthorized alien? This comes within the literal definition of "recruiting," but it is unlikely that Congress intended that result. The INS's regulations resolve this potential problem by only defining "recruit for a fee."²³ This means that recruiting without a fee

19. H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 57 (1986) [hereinafter H.R. REP. NO. 682].

20. *Id.*

21. 52 Fed. Reg. 16,221 (May 1, 1987) (new 8 C.F.R. § 274a.1(h)).

22. New INA § 274A(a)(1).

23. 52 Fed. Reg. 16,221 (May 1, 1987) (new 8 C.F.R. § 274a.1(e)).

does not subject an employer to the verification and sanctions provisions of the new law. The proposed regulations also clarify that employment eligibility verification must be done only at the time of hire or referral to the employer, not before.²⁴ This should lighten employers' burdens somewhat.

Another issue resolved by the regulations concerns recruiting or referring aliens who are out of the U.S. Normally, such aliens are unauthorized to work, because they do not have a visa to work in the U.S. yet. But neither generally can they apply for one until a job is offered. Thanks to the regulations, employment agencies can recruit or refer such aliens without fear of violating the IRCA, as long as the alien obtains appropriate work authorization before actually starting to work in the U.S.

Referring for a fee. The House and Senate conferees deleted Senate language that would have also penalized referring for "other consideration."²⁵ Elimination of this phrase clarifies that the legislation is not intended to apply to labor unions or other organizations that refer individuals for employment, but not for a fee or profit motive.²⁶

"Grandfathered" employees. The new Act specifies that sanctions can be imposed only for hiring, recruiting, or referring actions that take place after November 6, 1986, the date of enactment.²⁷ This "grandfather" clause means that employers may lawfully continue to employ unauthorized aliens hired before that date.²⁸ However, it also leaves such workers in a predicament. Only one employer in the U.S.—their current one—can employ them without facing possible sanctions. But these workers are still subject to apprehension in INS raids and subsequent deportation. It is possible that employers might exploit employees caught in this legal limbo, knowing there is nowhere else they can legally work.

Continuing employment. The new law prohibits an employer from knowingly continuing to employ an alien who is or has become unauthorized to work.²⁹ However, this ban does not apply to aliens hired before the date of enactment.³⁰ To see how this prohibition may work in the real world, consider the following hypotheticals. Law firm A hires Alien X as a messenger in 1985, knowing he is not authorized to work. Law firm A continues to employ X through 1988. Also in 1985, law firm B hires Alien

24. *Id.* at 16,222 (May 1, 1987) (new 8 C.F.R. § 274a.2(b)(1)(iv)).

25. H.R. CONF. REP. NO. 1000, *supra* note 17, at 85.

26. *Id.*; see also 52 Fed. Reg. 16,218, 16,221 (May 1, 1987) (new 8 C.F.R. § 274a.1(d), (e)) (excluding union hiring halls from the definitions of "refer for a fee" and "recruit for a fee.")

27. Pub. L. No. 99-603, § 101(a)(3)(A).

28. *Id.* § 101(a)(3)(B).

29. New INA § 274A(a)(2).

30. Pub. L. No. 99-603, § 101(a)(3)(B).

Y as an associate. Unlike Alien X, Alien Y has work authorization at the time of hire. Alien Y's work authorization expires, however, in 1988. Employer B continues to employ Alien Y after 1988, knowing about Y's unauthorized status.

Law firm C hires Alien Z as a secretary in 1987. Alien Z has work authorization at the time of hiring, but it expires in 1988. Firm C, like law firm B, continues to employ Alien Z after 1988, knowing about her undocumented status. Which of the three employers has violated the continuing employment ban?

Law firm A is clearly free from sanctions, because it hired X before the date of enactment. Law firm C is clearly subject to sanctions, because it hired Z after the new law took effect.

It is unclear from the statute itself whether law firm B is subject to sanctions. On the one hand, the grandfather clause might seem to protect it, because the firm hired Y before November 6, 1986. On the other hand, the new law also clearly forbids knowing continuing employment of an alien who "has become" unauthorized to work. The statute fails to clarify whether that prohibition extends to aliens hired before the date of enactment. Fortunately, the INS's regulations resolve this issue by imposing the continuing employment ban only on aliens hired after November 6, 1986.³¹

The IRCA did not address one common problem in this area: what to do when an alien and his or her employer have applied for an extension of stay before the expiration date of the alien's original visa, but do not receive the extension approval in time because of INS processing delays. Can the alien employee continue to lawfully work in the interim period until he or she receives the extension approval? Prior INS case law suggested not, raising concerns about the threat of employer sanctions if the employer continues to employ the alien during this time frame. Fortunately, the Service's implementing regulations resolve this problem by providing for an automatic extension of employment authorization for 120 days for certain nonimmigrant aliens who have filed timely applications for extension of stay.³²

Use of labor through contract. The new law's provision on the use of labor through contract might potentially limit the legislation's grandfather clause benefit for certain current employees. The law states that "a person

31. 52 Fed. Reg. 16,224 (May 1, 1987) (new 8 C.F.R. § 274a.3).

32. 52 Fed. Reg. 16,227, 16,228 (May 1, 1987) (new 8 C.F.R. §§ 274a.12(b)(15), 274a.13(d)). This conforms the regulations to the relevant legislative history, which indicates that sanctions for a continuing employment violation should not apply if the only reason the alien becomes out of status is because of INS processing delays. H.R. REP. NO. 682, *supra* note 19, at 57.

or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after the date of the enactment of this section" to knowingly obtain the labor of an unauthorized alien shall be deemed to have violated the IRCA Act.³³ Neither the statute nor the implementing regulations define the key phrases "contract" and "exchange." If interpreted broadly to include oral as well as written agreements, any employee's salary renewal or promotion might trigger a violation of this section, and thus vitiate the 1986 Act's separate grandfather clause benefit for current employees.³⁴ At the very least, the section clearly applies to written contracts. Employers of certain types of individuals, such as professional athletes, entertainers, and executives, which regularly employ aliens through written contracts that are renewed regularly, will want to consult with counsel about the ramifications of this provision.

The legislative history indicates that Congress did not focus on the possible conflict between this section and the grandfather clause, but rather on the potential for some employers to use subcontractors to attempt to mitigate liability for hiring undocumented aliens.³⁵ This provision expressly closes that loophole; general contractors are equally liable with subcontractors for the knowing employment of unauthorized aliens.³⁶

Self-employment and independent contractors. The IRCA does not expressly address self-employment or independent agent situations. For example, consider a company that hires an alien as an outside sales agent after the statute takes effect. Under the agreement with the company, the alien is paid only a percentage of the sales he or she generates. The alien receives no company benefits. The company considers the alien to be an independent contractor, not an employee. If the company knows the alien is not authorized to work, has it violated the 1986 Act? The provision governing use of labor through contract, discussed above, may stretch to cover this issue. Also, the legislative history states that the sanctions provisions "are not intended to limit in any way the scope of the term 'employee' in Section 2(3) of the National Labor Relations Act (NLRA), as amended, or of the rights and protections stated in Sections 7 and 8 of that Act."³⁷

The INS's regulations define "independent contractor" to include "individuals or entities who carry on independent business, contract to do

33. New INA § 274A(a)(4); *see also* 52 Fed. Reg. 16,224 (May 1, 1987) (new 8 C.F.R. § 274a.5).

34. *Cf.* Pub. L. No. 99-603, § 101(a)(3).

35. H.R. REP. No. 682, *supra* note 19, at 62.

36. *Id.*

37. H.R. REP. No. 682, *supra* note 19, at 58.

a piece of work according to their own means and methods, and are subject only as to results.”³⁸ The determination is to be made on a case-by-case basis. The factors identified in the regulations for determining whether a particular business arrangement constitutes an agreement with an independent contractor are consistent with Internal Revenue Service (IRS) guidelines.

Those IRS guidelines, however, are stricter than the standards developed by the National Labor Relations Board. Under the IRS it is not necessary that the employer actually direct or control the manner in which the services are performed to find an employer-employee relationship; it is sufficient if the employer has the right to do so. Despite this test, employers may be tempted to characterize many new hires as independent contractors in an effort to minimize their exposure under the IRCA.

Defenses. The legislation provides an affirmative defense for employers, recruiters, or referrers who show “good faith” compliance with the verification and recordkeeping requirements described later in this article.³⁹ The House Judiciary Committee report notes that good faith compliance can be shown by proof of the employer’s, recruiter’s, or referrer’s review and retention of the verification forms.⁴⁰ If a person or entity keeps this paper trail, a rebuttable presumption is established that he or she has acted in good faith, and the burden shifts to the government to prove otherwise.⁴¹ The government can rebut the presumption by offering proof that the documents did not reasonably on their face appear to be genuine, that the verification process was pretextual, or that the employer, recruiter, or referrer colluded with the employee in falsifying documents.⁴²

The legislative history also notes that even if the employer does not seek to establish an affirmative defense, the burden of proving a violation always remains on the government—by a preponderance of the evidence in the case of civil penalties, and beyond a reasonable doubt for criminal prosecutions.⁴³

This affirmative defense does not protect an employer from a continuing employment violation. Suppose, for example, that after the date of enactment an attorney interviews and hires an alien who is authorized to work. The alien’s work authorization expires a year later, and the lawyer, knowing that fact, continues to employ the alien. The fact that the attorney properly verified the alien’s work authorization at the time of hiring will

38. 52 Fed. Reg. 16,221 (May 1, 1987) (new 8 C.F.R. § 274a.1(j)).

39. New INA § 274A(a)(3); see *infra* text accompanying notes 45-82.

40. H.R. REP. No. 682, *supra* note 19, at 57.

41. *Id.*; see also 52 Fed. Reg. 16,224 (May 1, 1987) (new 8 C.F.R. § 274a.4).

42. H.R. REP. No. 682, *supra* note 19, at 57.

43. *Id.*

not protect him or her from sanctions for continuing to employ the alien after the authorization has expired.⁴⁴

C. VERIFICATION REQUIREMENTS

Generally. To ensure that prospective employees are eligible to work in the U.S., the new law provides a verification system. The system involves examining certain types of specified documents to verify two things: (1) that the applicant is presenting his or her true identity and (2) that the applicant is eligible to work.⁴⁵ The employer, recruiter, or referrer must then sign new INS Form I-9, attesting under penalty of perjury that the required documents have been examined.⁴⁶ The individual must also sign the same form, attesting under penalty of perjury that he or she is a U.S. citizen or national, a lawful permanent resident alien, or an alien authorized to work.⁴⁷ The employer, recruiter, or referrer must retain these forms for at least three years, and may not dispose of them, in any event, until one year after the individual's employment ends.⁴⁸ These verification requirements apply to both U.S. and alien applicants.

Types of documents. Certain documents will establish both an individual's employment authorization and identity. Included in this category are: (1) a U.S. passport; (2) a certificate of U.S. citizenship or naturalization; (3) an unexpired foreign passport, if endorsed to show work authorization; (4) a resident alien registration receipt card (INS Form I-551); or (5) an unexpired work permit, issued by the INS.⁴⁹ The law and regulations do not require the U.S. passport to be valid.⁵⁰ Presumably an expired U.S. passport will be acceptable.

Alternatively, an individual can present one document evidencing employment authorization—such as a Social Security card or U.S. birth certificate—and one document establishing identity—such as a driver's license, school identification card, voter registration card, or draft card.⁵¹

Authenticity of documents. An employer, recruiter, or referrer is deemed to comply with the verification requirements if the document "reasonably

44. *Id.*; see also 52 Fed. Reg. 16,224 (May 1, 1987) (new 8 C.F.R. § 274a.3).

45. New INA § 274A(b)(1).

46. *Id.*

47. New INA § 274A(b)(2).

48. New INA § 274A(b)(3); see also 52 Fed. Reg. 16,223 (May 1, 1987) (new 8 C.F.R. § 274a.2(b)(2)).

49. New INA § 274A(b)(1)(B); 52 Fed. Reg. 16,222 (May 1, 1987) (new 8 C.F.R. § 274a.2(b)(1)(v)(A)).

50. New INA § 274A(b)(1)(B)(i); 52 Fed. Reg. 16,222 (May 1, 1987) (new 8 C.F.R. § 274a.2(b)(1)(v)(A)(1)).

51. New INA § 274A(b)(1)(C)-(D); 52 Fed. Reg. 16,222 (May 1, 1987) (new 8 C.F.R. § 274a.2(b)(1)(v)(B-C)).

appears on its face to be genuine.”⁵² The legislative history states that the “reasonable man” standard is to be used in implementing this provision.⁵³ Assuming the employer’s, recruiter’s, or referrer’s examination of the applicant’s documentation meets this test, there is no requirement that an employer request additional documentation or that the applicant produce additional proof.⁵⁴ Moreover, the legislative history emphasizes that “documents that reasonably appear to be genuine should be accepted by employers without requiring further investigation of those documents.”⁵⁵

Recruiting and referring. The verification requirements apply to any “person or other entity hiring, recruiting, or referring an individual for employment in the United States.”⁵⁶ Thus, employment agencies and other recruiters and referrers clearly have to comply with the verification requirements, just as employers do. Verification worried recruiters and referrers greatly. Over 3,100 of the 4,000 comments the INS received on its proposed employer sanctions regulations concerned this issue. Many employment agencies complained that they would have to limit their activities to a small geographic area if they had to perform face-to-face verifications. Most recruitment is done over the phone, and the recruiter or referrer never meets the applicant.

The Service capitulated to the outcry. The final rule granted recruiters and referrers significantly more leeway in complying with the IRCA than for other types of businesses. Specifically, unlike other entities, recruiters and referrers do not have to retroactively verify individuals recruited or referred during the period between November 6, 1986 and May 31, 1987.⁵⁷ Also, recruiters and referrers only have to verify those individuals actually hired as a result of the referral.⁵⁸ Most importantly, recruiters and referrers do not have to verify the person’s work eligibility themselves; they can have others, including the hiring employer, complete the I-9 form for them. Liability still ultimately rests, however, with the recruiter or referrer.

Verification by a state employment agency. The verification requirements are deemed fulfilled if the individual was referred by a state employment agency and the referral documentation certifies that the agency has complied with the new law’s verification procedures.⁵⁹ The House-

52. New INA § 274A(b)(1)(A).

53. H.R. REP. NO. 682, *supra* note 19, at 62.

54. New INA § 274A(b)(1)(A).

55. H.R. REP. NO. 682, *supra* note 19, at 62.

56. New INA § 274A(b).

57. 52 Fed. Reg. 16,221 (May 1, 1987) (new 8 C.F.R. § 274a.2(a)).

58. *Id.* at 16,222 (May 1, 1987) (new 8 C.F.R. § 274a.2(b)(1)(iv)).

59. New INA § 274A(a)(5); *see also* 52 Fed. Reg. 16,224 (May 1, 1987) (new 8 C.F.R. § 274a.6)).

Senate conference report emphasizes that this provision is not intended to impose any additional affirmative duty on state employment agencies.⁶⁰ Given the overworked nature of most such agencies, few may be willing to provide such certifications.

This benefit to employers does not extend to referrals from private employment or recruiting agencies. Thus, employers have to comply with the verification requirements even if the private agency certifies that it has already done so.

Applicability to "grandfathered" employees. Employers are not required to verify the status of employees hired before November 6, 1986, the date of enactment, because the Act only mandates verification for "hiring, recruiting, or referring," not for continued employment. Such aliens are known as "grandfathered" employees. The statute does not accord undocumented "grandfathered" alien employees the right to remain in the U.S. It only exempts their employers from penalties for continuing to employ them. Under the IRS's regulations, an alien employee loses "grandfathered" status if he or she quits, is fired, or is deported from the U.S. Temporary leaves, lay-offs, and strikes, however, will not jeopardize an alien's "grandfathered" status.⁶¹

Applicability to new employees. The regulations require employers to retroactively complete the I-9 form for individuals hired after November 6, 1986, who were still employed as of May 31, 1987. Employers have until September 1, 1987, to complete the form for those new hires. Individuals hired after June 1, 1987, must generally be verified within three business days.⁶²

Applicability to Legalization Applicants. The INS has devised a special interim rule to govern verification of undocumented aliens who plan to apply for legalization. An employer thinking of hiring such an alien is to ask the applicant two questions: (1) "Do you claim to qualify for the legalization provisions of the new immigration law?" and (2) "Do you intend to apply for legal status and seek interim work authorization from INS?"⁶³ If the alien answers yes to both questions, the employer should note the answers on the I-9 form.⁶⁴ The alien does not have to provide any further documentation to prove his intent to apply for legalization. By following this procedure the employer will have complied with the

60. H.R. CONF. REP. NO. 1000, *supra* note 17, at 89.

61. 52 Fed. Reg. 16,223-24 (May 1, 1987) (new 8 C.F.R. §§ 274a.2(b)(1)(viii), 274a.7(d)).

62. 52 Fed. Reg. 16,221-22 (May 1, 1987) (new 8 C.F.R. § 274a.2(a), (b)(1)).

63. *See* 52 Fed. Reg. 11,568 (April 9, 1987).

64. 52 Fed. Reg. 16,226 (May 1, 1987) (new 8 C.F.R. § 274a.11)). A sample I-9 form showing the correct way to complete the form for a legalization applicant is reproduced in 64 *Interpreter Releases* 487 (1987).

verification requirements of the new law and can lawfully employ the alien until September 1, 1987.

The INS's temporary rule for legalization applicants results from a partial settlement in a class action challenging various aspects of the 1986 immigration reform laws.⁶⁵ This special procedure need only be followed for legalization applicants hired after November 6, 1986. As noted above, alien employees hired before the date of enactment are "grandfathered in." No verification of those employees need be conducted.⁶⁶

Recordkeeping requirements. Agencies that refer or recruit but do not hire must keep the completed verification form at least three years after the date of the recruiting or referral.⁶⁷ For individuals who are hired, the employer must retain the form for at least three years, or one year after the employee is terminated, whichever is later.⁶⁸ This could mean that an employer will have to retain the verification form for decades, if the employee decides to stay with the company his or her entire career.

How quickly employers must complete the I-9 Form paperwork was a source of controversy at the House-Senate conference. The conferees eventually dropped a provision in the House bill that would have allowed employers a twenty-four-hour grace period to show compliance.⁶⁹ Instead, the conferees directed the INS to issue regulations concerning this issue that would address the practical problems confronting day laborers and agricultural employers.⁷⁰ The conference report states that:

The employer shall be presumed to be in compliance with the paperwork and verification requirements for the first twenty-four hours after the worker has been hired to allow the worker time to produce the required documents under this subsection. The Justice Department may rebut this presumption with evidence that the employer has attempted to evade liability for employer sanctions and responsibilities for verification through the employment of day hires.⁷¹

The INS's preliminary working draft regulations followed the legislative history on this point by giving a twenty-four-hour grace period for compliance with the paperwork and verification requirements.⁷² In response to criticism by employers, however, the Service extended that time period

65. *Catholic Social Services v. Meese*, No. CIV-S-86-1434-LKK (E.D. Cal. March 23, 1987), reported in 64 *Interpreter Releases* 376-77, 437-38, 446-57 (1987). A notice containing the terms of the settlement appears in 52 Fed. Reg. 11,567-75 (April 9, 1987).

66. See *supra* text accompanying note 61.

67. New INA § 274A(b)(3)(A); 52 Fed. Reg. 16,223 (May 1, 1987) (new 8 C.F.R. § 274a.2(b)(2)(i)(B)).

68. New INA § 274A(b)(3)(B); see also 52 Fed. Reg. 16,223 (May 1, 1987) (new 8 C.F.R. § 274a.2(b)(2)(i)(A)).

69. H.R. CONF. REP. No. 1000, *supra* note 17, at 89.

70. *Id.*

71. *Id.*

72. Proposed 8 C.F.R. § 274a.3(e)(1), reprinted in 64 *Interpreter Releases* 97 (1987).

in its final regulations to three business days in most cases.⁷³ An employer who hires someone for less than three days must complete the I-9 verification form before the end of the employee's first working day.⁷⁴

Inspections. Form I-9 must be produced for inspection within three business days after being requested by an INS official.⁷⁵ No subpoena or warrant is required.⁷⁶ Any refusal or delay in the presentation of each Form I-9 for inspection constitutes noncompliance with the law.⁷⁷

Copying verification documents. The new law permits copying and retention of documents presented by applicants for verification purposes.⁷⁸ It may seem silly to include such a provision in a federal statute. However, a provision of the U.S. Code makes it a criminal offense to copy certain immigration documents, including certificates of naturalization and citizenship, which are two of the documents that can be used to establish identity and employment authorization.⁷⁹ This section overcomes that prohibition, but only for verification purposes.

Employers, recruiters, and referrers are not obligated to keep copies of the documentation presented to them by applicants. The advantages of retaining copies of an applicant's documents are several: (1) it proves that the employer, recruiter, or referrer examined the necessary documents and that they reasonably appeared on their face to be genuine; (2) it shows a good faith intent to comply with the law; (3) it provides evidence if an employee later claims an employer did not verify; and (4) it may help to deter further inquiry by INS agents.

The disadvantages are: (1) the INS may question whether the documents are genuine; (2) inconsistency in keeping copies could lead to charges of discrimination; (3) it adds to the paperwork burden and cost of compliance; and (4) the likelihood of being audited is small. On the whole, however, cautious employers may prefer to keep copies of the documentation.

Limits on the use of the verification form. The verification form and any information on or attached to it may be used only to enforce the INA and for prosecuting violations of 18 U.S.C. section 1001 (prohibiting false statements or concealment of material facts), section 1028 (prohibiting use or transfer of false identification documents), section 1546 (prohibiting fraud and misuse of immigration documents), and

73. 52 Fed. Reg. 16,222 (May 1, 1987) (new 8 C.F.R. § 274a.2(b)(1)(ii)).

74. *Id.* (new 8 C.F.R. § 274a.2(b)(1)(iii)).

75. *Id.* at 16,223 (new 8 C.F.R. § 274a.2(b)(2)(ii)).

76. *Id.*

77. *Id.*

78. New INA § 274A(b)(4); *see also* 52 Fed. Reg. 16,223 (May 1, 1987) (new 8 C.F.R. § 274a.2(b)(3)).

79. 18 U.S.C. § 1426 (1982); *see supra* note 49 and accompanying text.

section 1621 (prohibiting perjury).⁸⁰ Thus, for example, this information generally would not be available to the Internal Revenue Service or the Social Security Administration. The legislative history states that the law is designed to ensure that the verification information will not be used by the INS to apprehend and deport undocumented aliens.⁸¹ The information can be used, however, in employment discrimination cases.⁸²

D. PENALTIES

Generally. The civil penalties for hiring, recruiting, referring, or continuing to employ an unauthorized alien are: first offense—\$250–\$2,000 per unauthorized alien, second offense—\$2,000–\$5,000 per unauthorized alien, and third offense—\$3,000–\$10,000 per unauthorized alien.⁸³ An employer, recruiter, or referrer who engages in “a pattern or practice” of employment violations is subject to criminal penalties of up to \$3,000 for each unauthorized alien and up to six months imprisonment.⁸⁴ An injunction against “pattern or practice” violators is also possible.⁸⁵

An employer, recruiter, or referrer who fails to ask job applicants for identification documents is subject to a civil penalty of \$100–\$1,000 for each such applicant.⁸⁶ No criminal penalties attach to the paperwork violations, however.⁸⁷ The paperwork penalties apply even if the applicant is a U.S. citizen.⁸⁸

Effective dates. Technically, both the ban on knowingly employing, recruiting, or referring an unauthorized alien and the new law’s paperwork requirements became effective on November 6, 1986, the date of the enactment. However, the law stated that penalties for violating these provisions did not take effect until June 1, 1987.⁸⁹ The interim six months was strictly a public education period, and no sanctions can be imposed for violations alleged to have occurred during that period.⁹⁰

80. New INA § 274A(b)(5); *see also* 52 Fed. Reg. 16,223 (May 1, 1987) (new 8 C.F.R. § 274a.2(b)(4)).

81. H.R. REP. NO. 682, *supra* note 19, at 61.

82. *Id.*

83. New INA § 274A(e)(4); *see also* 52 Fed. Reg. 16,225 (May 1, 1987) (new 8 C.F.R. § 274a.10(b)(1)).

84. New INA § 274A(f)(1).

85. New INA § 274A(f)(2).

86. New INA § 274A(e)(5); *see also* 52 Fed. Reg. 16,225 (May 1, 1987) (new 8 C.F.R. § 274a.10(b)(2)).

87. New INA § 274A(e)(5).

88. *Id.*

89. New INA § 274A(i)(1).

90. New INA § 274A(i)(1)(B).

According to the statute, during the next twelve-month period between June 1, 1987, and May 31, 1988, only a citation can be imposed for first violations.⁹¹ The House Judiciary Committee report directs the INS to issue a citation only if it has "persuasive" evidence that a violation has occurred.⁹² The INS is to issue guidelines, including specific examples, of what constitutes persuasive evidence.⁹³ To date it has not done so. No judicial review of a citation is provided.⁹⁴ An employer, recruiter, or referrer could be fined for a subsequent offense during this twelve-month period.⁹⁵

A similar citation period exists for the new law's paperwork requirements.⁹⁶ After the twelve-month warning period, the full penalty schedule takes effect; no preliminary citations will be given.

Administrative delay in the effective date. Enforcement of employer sanctions did not begin on June 1, 1987, as planned. The Service was slow to educate businesses about their obligations. For example, it did not even mail its handbook explaining the new law to all employers until late June, and its public education and advertising campaign was minimal. In response to these problems, Sen. Dennis DeConcini (D-AZ) sponsored an amendment to the fiscal year 1987 supplemental appropriations bill that would have delayed the start of employer sanctions for four months, until October 1, 1987. The Senate approved the measure, but the provision was ultimately dropped in the House-Senate conference committee upon assurances by the Service that it would not issue a warning citation against an employer for failing to comply with the verification requirements until after the business had first been contacted by a Service official to explain the new law.⁹⁷ INS Commissioner Alan C. Nelson characterized the employer visits as the first part of a phased-in approach to enforcement of employer sanctions.⁹⁸ The informational visits are to continue through June 1, 1988. As of the date this article was written, the INS had not issued any citations.

Factors in determining penalty for paperwork violations. The statute lists five factors to be considered in determining the amount of the civil money penalty for paperwork violations: (1) the employer's size; (2) whether the employer acted in good faith; (3) the seriousness of the violation; (4) whether or not the individual was an unauthorized alien; and

91. New INA § 274A(i)(2).

92. H.R. REP. NO. 682, *supra* note 19, at 58.

93. *Id.*

94. *Id.*

95. H.R. CONF. REP. NO. 1000, *supra* note 17, at 86.

96. See new INA § 274A(i)(2) (citation period for violations of new INA § 274A(a)). § 274A(a)(1)(B) includes the new law's paperwork requirements within the scope of § 274A(a).

97. 133 CONG. REC. H5680-81 (daily ed. June 27, 1987).

98. See 64 *Interpreter Releases* 875-76, 889-91 (1987).

(5) the history of previous violations, if any.⁹⁹ No similar factors are set forth to aid in determining the size of money penalties for violations of the ban on hiring, recruiting, or referring unauthorized aliens.

Counting the number of violations. The House Judiciary Committee report states that "in counting the number of previous determinations of violations for purposes of determining which penalty applies, determinations of more than one violation in the course of a single proceeding or adjudication are counted as a single determination."¹⁰⁰ Thus, for example, if an employer is found in a first proceeding to have knowingly hired four unauthorized aliens, the maximum penalty that can be imposed against the same employer in the next adjudication is \$5,000 per alien, i.e., the maximum for a second violation.

Separate subdivisions. The Act provides that separate subdivisions shall be considered separate employers, recruiters, or referrers for purposes of the new law if they meet certain criteria.¹⁰¹ The subdivisions must be physically separate, and must do their own hiring and recruiting completely independently.¹⁰² Each subdivision must not be "under the control of or [in] common control with" another subdivision.¹⁰³

The paragraph about subdivisions lies in a subsection describing the penalties only for hiring, recruiting, and referring violations.¹⁰⁴ The subsection describing penalties for paperwork violations fails to contain similar language about separate subdivisions.¹⁰⁵ This raises the possibility that the benefit intended for separate subdivisions may apply only for hiring, recruiting, and referring violations, not for paperwork violations. It seems doubtful that Congress intended this discrepancy. Fortunately, the INS's implementing regulations appear to allow the separate subdivision benefit for all violations.¹⁰⁶

Large corporations with multiple offices may want to consider decentralizing their personnel functions as much as possible to minimize the company's exposure to those sanctions. The following example from the House Judiciary Committee report highlights the advantage of separate subdivisions:

[S]uppose automaker A has two distinct subdivisions, X and Y. In 198[7], subdivision X commits its second violation, i.e., it becomes liable under the

99. New INA § 274A(e)(5); see also 52 Fed. Reg. 16,225 (May 1, 1987) (new 8 C.F.R. § 274a.10(b)(2)).

100. H.R. REP. NO. 682, *supra* note 19, at 60.

101. New INA § 274A(e)(4).

102. *Id.*

103. *Id.*; see also 52 Fed. Reg. 16,225 (May 1, 1987) (new 8 C.F.R. § 274a.10(b)(3)).

104. New INA § 274A(e)(4).

105. New INA § 274A(e)(5).

106. See 52 Fed. Reg. 16,225 (May 1, 1987) (new 8 C.F.R. § 274a.10(b)(3)).

first civil fine provision. At that point, automaker A is jointly responsible with X for such liability. In 198[7], subdivision Y commits its first violation (which by definition, results in a citation only). At that point automaker A is, like Y, responsible for that violation. However, insofar as A is concerned, the violation by Y is A's first violation. That is to say, the violation by Y is not added to the previous two violations by X to create third stage liability (i.e., a second level civil fine) for automaker A. In short, the parent corporation can never be subject to a level of offense that is higher than the highest level reached by any of its independent subdivisions.¹⁰⁷

In addition, without the benefit of the separate subdivisions provision, large corporations may suffer an increased risk of criminal liability, because the cumulative number of violations may more easily establish a "pattern or practice" of violations.

"*Pattern or practice.*" As noted above, a person or entity who engages in a "pattern or practice" of hiring, recruiting, or referring undocumented aliens can be jailed for up to six months and/or fined up to \$3,000 per unauthorized alien.¹⁰⁸ "Pattern or practice" is not defined in the new law itself, but the legislative history makes clear that the phrase is to be construed similarly to other statutes containing that phrase.¹⁰⁹ It is expected that courts will follow the judicial construction of the phrase as set forth in such cases as *International Brotherhood of Teamsters v. United States*,¹¹⁰ *United States v. International Association of Ironworkers Local No. 1*,¹¹¹ and *United States v. Mayton*.¹¹² These cases all indicate that the term "pattern or practice" applies only to regular, repeated, and intentional activities.¹¹³ The Service's regulations adopt this test.

Injunctions. The Attorney General may seek an injunction in a U.S. district court against a person or entity who he has "reasonable cause to believe" is engaging in a pattern or practice of hiring, recruiting, or referring unauthorized aliens.¹¹⁴ The legislative history to this provision states that injunctive relief is designed to improve the government's ability to deal with repeat offenders.¹¹⁵

107. H.R. REP. NO. 682, *supra* note 19, at 60.

108. New INA § 274A(f)(1).

109. H.R. REP. NO. 682, *supra* note 19, at 59; *see, e.g.*, Voting Rights Act, 42 U.S.C. §§ 1971-1974; Civil Rights Act of 1964, 42 U.S.C. §§ 2000-2005; Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631.

110. 431 U.S. 324 (1977).

111. 438 F.2d 679 (7th Cir. 1971).

112. 335 F.2d 153 (5th Cir. 1964).

113. 52 Fed. Reg. 16,221 (May 1, 1987) (new 8 C.F.R. § 274a.(1)(k)) (definition of "pattern on practice").

114. New INA § 274A(f)(2); *see also* 52 Fed. Reg. 16,225-26 (May 1, 1987) (new 8 C.F.R. § 274a.10(c)).

115. H.R. REP. NO. 682, *supra* note 19, at 59-60.

As with the civil and criminal penalties described above, injunctions are not available the first six months after enactment.¹¹⁶ Injunctions are not provided for paperwork violations.

Compliance procedures. The legislation requires the INS to draft regulations establishing procedures for investigating and prosecuting employment, recruiting, and referring violations.¹¹⁷ The Act envisions that individuals will be able to file complaints, which the INS must investigate if they have "a substantial probability of validity."¹¹⁸ The INS's regulations generally follow the legislative framework on this point.¹¹⁹ A new INS unit is to be created specifically to investigate and prosecute alleged employment violations.¹²⁰

Persons charged with violating the ban on hiring or recruiting or referring undocumented aliens will be provided with at least thirty-days' notice, and an opportunity for a hearing before an administrative law judge (ALJ).¹²¹ Assuming an employer has a defense, he should always request a hearing, because failure to do so will render the Service's final order unappealable.¹²² Assuming a hearing is requested, it must follow the procedures set forth in the Administrative Procedure Act (APA).¹²³ This is different from other hearings held under the INA, which do not have to conform to the APA.¹²⁴

The government must prove its case by a preponderance of the evidence in civil cases, and beyond a reasonable doubt in criminal prosecutions.¹²⁵ The new law provides for administrative appellate review, as well as judicial review by the relevant court of appeals.¹²⁶

E. PREEMPTION

The new law explicitly preempts state and local employer sanctions law.¹²⁷ At last count there were about thirteen of these, although many

116. *Id.* at 60.

117. New INA § 274A(e)(1).

118. New INA § 274A(e)(1)(B).

119. 52 Fed. Reg. 16,225 (May 1, 1987) (new 8 C.F.R. § 274a.9).

120. New INA § 274A(e)(1)(D).

121. New INA § 274A(e)(3)(A); *see also* 52 Fed. Reg. 16,225 (May 1, 1987) (new 8 C.F.R. § 274a.9(c)(d)).

122. New INA § 274A(e)(3)(B); *see also* 52 Fed. Reg. 16,225 (May 1, 1987) (new 8 C.F.R. § 274a.9(d)(2)).

123. *Id.*; *see* 5 U.S.C. § 554 (1982).

124. *See* *Marcello v. Bonds*, 349 U.S. 302 (1955); Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 3034 (1984).

125. New INA § 274A(e)(3)(C).

126. New INA § 274A(e)(6), (7).

127. New INA § 274A(h)(2).

have not been vigorously enforced. The legislative history notes that the new federal law is:

not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.¹²⁸

F. INDEMNIFICATION

The new law expressly prohibits employers, recruiters, or referrers from requiring a job applicant to indemnify them against any potential liability for either paperwork or unlawful employment violations.¹²⁹ The penalty for violating this indemnification ban is \$1,000 for each violation.¹³⁰ The violator must also return the amount of the bond or security to the individual.¹³¹

As with the other employer sanctions, there was a six-month education period until June 1, 1987, before this provision took effect. However, there is no subsequent twelve-month first citation period.

Interestingly, the law does not prohibit a general contractor from requiring indemnification bonds from subcontractors. Thus, although a general contractor is liable if he knows a subcontractor is employing undocumented aliens, the prime contractor can protect himself by requiring the subcontractor to reimburse the prime for any civil penalties the prime must pay. Such indemnification bonds may well become standard language in future construction and other contracts.

G. TERMINATION OF SANCTIONS

It is possible, but unlikely, that employer sanctions will end in 1989. The legislation requires the General Accounting Office (GAO) to submit to Congress and to a special task force three annual reports analyzing, among other things, whether the sanctions provisions have created (1) an unnecessary regulatory burden on employers and/or (2) a pattern of employment discrimination based on national origin.¹³² If the GAO finds

128. H.R. REP. NO. 682, *supra* note 19, at 58.

129. New INA § 274A(g)(1).

130. New INA § 274A(g)(2).

131. *Id.*; see also 52 Fed. Reg. 16,224 (May 1, 1987) (new 8 C.F.R. § 274a.8).

132. New INA § 274A(j)(1).

such discrimination in any of its reports, the task force must then recommend corrective legislation to Congress.¹³³ The bill specifies that employer sanctions are to end if (1) the last GAO report states that a “widespread pattern of discrimination” has resulted solely from employer sanctions and (2) Congress enacts a joint resolution within thirty days of that report concurring in the findings.¹³⁴ Congress is unlikely to adopt such a resolution, both because of the problems inherent in finding a “widespread” pattern of discrimination *solely* because of employer sanctions and because of the intense political emotions on both sides of the immigration issue.

II. Antidiscrimination

A. OVERVIEW

Section 102 of the IRCA creates a new section 274B of the INA.¹³⁵ Section 274B prohibits discrimination in hiring and firing based on an individual’s national origin or citizenship status. The protected class of people include U.S. citizens, nationals, lawful permanent resident aliens, refugees, asylees, and newly legalized aliens who have filed a notice of intent to become U.S. citizens. It does not protect aliens who are not authorized to work. The law applies to employers, referrers, and recruiters who employ three or more people, and prohibits discrimination both in hiring and firing. Employers will not violate the antidiscrimination provisions if federal, state, or local laws or contracts require them to use U.S. citizens. Also, employers may choose a U.S. citizen over an alien if both applicants are equally qualified.

The new law creates a special office in the Justice Department to investigate and prosecute charges of discrimination stemming from unlawful immigration-related employment practices. A finding of discrimination can result in a civil penalty of up to \$2,000 for each individual discriminated against, as well as an order to rehire the individual(s), with or without back pay.

The antidiscrimination provisions will end automatically if employer sanctions are terminated. Even if employer sanctions continue, the antidiscrimination provisions may end if Congress enacts a joint resolution to terminate them.

133. New INA § 274A(k).

134. New INA § 274A(1).

135. Pub. L. No. 99-603, § 102 (creating new INA § 274B).

B. BACKGROUND

Generally. The antidiscrimination provisions complement the employer sanctions provisions of the new law. Many minorities, especially Hispanics and Asians, worried that employer sanctions might result in increased national origin or alienage discrimination, and that enforcement of employer sanctions would not suffice to prevent such discrimination.¹³⁶ It was also believed that current law, particularly Title VII of the Civil Rights Act of 1964 and 42 U.S.C. section 1981, was inadequate to protect against such discrimination. For those reasons, Congress adopted the antidiscrimination provisions in the IRCA. The provisions are also known as the Frank amendment, after their primary sponsor, Representative Barney Frank (D-MA).

Title VII limitations. Title VII of the Civil Rights Act of 1964 protects individuals from discrimination based on race, religion, color, sex, or national origin.¹³⁷ In *Espinoza v. Farah Manufacturing Co.*¹³⁸ the Supreme Court held that Title VII's prohibition against national origin discrimination does not bar discrimination based solely on alienage. National origin refers to the country where a person was born, or from which his or her ancestors came. Alienage refers to a person's status as a noncitizen. An example of national origin discrimination is an employer's refusal to hire any individuals of a particular national origin, such as Mexican-Americans. An example of alienage discrimination is an employer's policy to hire only U.S. citizens, thereby discriminating against all aliens, even if alien applicants have authorization to work. Under *Espinoza*, as long as the employer's citizenship requirement is not a pretext for actually discriminating against one national group (e.g., Mexican-Americans), the employer has not violated Title VII. For example, in *Espinoza* a Mexican-American noncitizen was refused employment at a plant where 96 percent of the employees were of Mexican ancestry.¹³⁹ With those facts, the plaintiff obviously could not show that the employer was discriminating on the basis of national origin, i.e., against all Mexican-Americans.

A further problem with Title VII is the limited scope of its coverage. Title VII covers only employers who employ fifteen or more employees.¹⁴⁰ It has been estimated that half of all employers may not be subject to

136. See generally *Anti-Discrimination Provision of H.R. 3080: Joint Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary and the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 110-28 (1985) (statement of Rep. Robert Garcia (D-NY)) [hereinafter *Joint Hearing*].

137. 42 U.S.C. § 2000e-2 (1982).

138. 414 U.S. 86 (1973).

139. *Id.* at 93.

140. 42 U.S.C. § 2000e(b)(1982).

Title VII because they are too small. Moreover, only those employees who work twenty or more calendar weeks each year are protected.¹⁴¹ Thus, employers who only hire seasonal workers are exempted, even if they employ hundreds of workers. Finally, Title VII permits several discriminatory practices. For example, a statutory exception allows discrimination on grounds of national origin where national origin characteristics constitute a "bona fide occupational qualification" reasonably necessary to the operation of the business.¹⁴² Another exception allows the use of practices that have a discriminatory effect as long as the practice has a relationship to job performance or is supported by a business necessity.¹⁴³

42 U.S.C. section 1981 limitations. 42 U.S.C. section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ."¹⁴⁴ The section is intended to protect against private discrimination, including employment discrimination, based on race.¹⁴⁵ At least one circuit court of appeals decision and a few district court opinions have allowed a plaintiff to bring a claim of alienage discrimination under section 1981.¹⁴⁶ Other courts, however, have rejected that view.¹⁴⁷ Thus it is unclear whether section 1981 prohibits private discrimination on the basis of alienage. Even if it does, certain practical problems limit the usefulness of the section to provide a remedy for victimized aliens.¹⁴⁸

C. SCOPE OF SECTION

Scope of protection. The IRCA's antidiscrimination provisions prohibit employment discrimination on the basis of a person's "national origin" or "citizenship status."¹⁴⁹ "Citizenship status" is not identical with "alienage." The two terms are discussed in further detail below. "National origin" is derived from Title VII. Thus the two statutes overlap to a certain extent. However, as indicated above, Title VII protection applies only to

141. *Id.*

142. 42 U.S.C. § 2000e-2(e)(1982); *see also* Dothard v. Rawlinson, 433 U.S. 321 (1977); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

143. *See, e.g.,* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

144. 42 U.S.C. § 1981 (1982).

145. *See* Johnson v. Railway Express Agency, 421 U.S. 454 (1975).

146. Guerra v. Manchester Terminal Corat, 498 F.2d 641 (5th Cir. 1974); Espinoza v. Hillwood Square Mutual Ass'n, 522 F. Supp. 559 (E.D. Va. 1981); Ortega v. Merit Ins. Co., 433 F. Supp. 135 (N.D. Ill. 1977); *cf.* St. Francis College v. Al-Khazraji, 55 U.S.L.W. 4626 (U.S. May 18, 1987) (§ 1981 protects persons from intentional discrimination based on ancestry or ethnicity).

147. *See, e.g.,* De Malherbe v. International Union of Elevator Constructors, 438 F. Supp. 1121 (N.D. Cal. 1977).

148. *See Joint Hearing, supra* note 136, at 413-14.

149. New INA § 274B(a)(1).

employers of fifteen or more employees, while the Frank amendment applies to all employers of three or more employees.¹⁵⁰ Thus the IRCA extends civil rights protection for claims of national origin discrimination to more employees, and creates new protection for claims of discrimination based on citizenship status.

An example of discrimination based on citizenship status is an employer's refusal to hire any applicant who fails to present a U.S. passport. The verification provision in the employer sanctions portion of the Simpson-Rodino Act provides numerous alternatives to a U.S. passport to establish an applicant's work authorization and identity, and the law specifically states that as long as the other documentation reasonably appears to be genuine, the employer is not required to request further documentation, such as a passport.¹⁵¹ If an employer insists on requiring a passport, that could be proof of discrimination in violation of the Frank amendment.

Hiring and firing. Under the Frank amendment an employer may not discriminate based on national origin or citizenship status in hiring or firing an individual.¹⁵² The law also prohibits such discrimination when recruiting or referring an individual for a fee.¹⁵³

This scope of protection seems to be much narrower than under Title VII, which extends beyond hiring and firing to prohibit discrimination with respect to "compensation, terms, conditions, or privileges of employment."¹⁵⁴ This difference between the IRCA and Title VII appears to mean that employers of between four and fourteen people could, after an individual is hired, lawfully treat that person less favorably than other employees in promotional opportunities, raises, and other terms of employment, if the discrimination is based solely on the person's national origin. Similarly, any employer of more than three workers may be able to treat employees unfairly in the terms of their employment if the discrimination is based on citizenship status. In certain circumstances, however, this kind of discrimination on the job could be considered a constructive discharge, and thus perhaps invoke the Frank amendment after all. Constructive discharge occurs when an employer makes an employee's working conditions so intolerable that a reasonable person would feel forced to resign.¹⁵⁵

150. New INA § 274B(a)(2).

151. See new INA § 274A(b)(1), *discussed supra* at text accompanying notes 52-55.

152. New INA § 274B(a)(1).

153. *Id.* The language concerning recruiting or referring for a fee is identical to that used in the employer sanctions section of the statute. For further discussion of the questions concerning the scope of that language, see *supra* text accompanying notes 23-24.

154. 42 U.S.C. § 2000e-2(a)(1)(1982).

155. See, e.g., *Irving v. Dubuque Packing Co.*, 689 F.2d 170, 172 (10th Cir. 1982); *Clark v. Marsh*, 665 F.2d 1168 (D.C. Cir. 1981); *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 372 (5th Cir. 1981); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981).

Some aliens may claim that other facets of employment should be considered to fall within the ambit of section 274B. For example, disparities in salary, working conditions, work rules, or benefits that exist at the time of employment may constitute discrimination "with respect to . . . hiring."¹⁵⁶ On the other hand, Senator Alan K. Simpson (R-WY), one of the prime authors of the 1986 legislation, has expressed the view that promotion decisions are outside the purview of the Act.¹⁵⁷

All this confusion about the scope of the Frank amendment's protection will no doubt lead to much litigation.

Unlike employer sanctions, the antidiscrimination provisions have no six-month grace period during which penalties cannot be imposed.¹⁵⁸ The Frank amendment also contains a 180-day statute of limitations period.¹⁵⁹ The combination of these provisions poses possible problems for employers, and opportunities for employees. For example, suppose an employer, fearful of employer sanctions, fired some of his long-time foreign-looking employees on December 1, 1986, right after the new law was enacted. The employer should not have done this, for two reasons. First, the IRCA specifically exempts already hired employees from employer sanctions or the verification provisions. Second, if the employer discriminated in his firing decision on the basis of national origin or citizenship status, he has violated the antidiscrimination provisions. With the six-month statute of limitations, the fired employees could have filed discrimination claims in spring 1987, even though employer sanction penalties did not take effect until later. If successful, the fired employees might have to be reinstated, perhaps with back pay. The employer might also have to pay a fine of \$1,000 for each employee unlawfully fired. The bottom line: Employers should not panic and fire current employees simply because of the new law's employer sanctions provisions. Employees who are unlawfully fired should be sure to preserve their rights by filing a discrimination claim before the six-month statute of limitations expires.

Individuals protected. The categories of individuals protected under the IRCA's antidiscrimination provisions vary with the type of discrimination alleged. Any individual other than an unauthorized alien is protected from national origin discrimination.¹⁶⁰ By contrast, only U.S. citizens, nationals, and "intending citizen[s]" qualify for protection from discrimination based on citizenship status.¹⁶¹ Thus, an alien green cardholder, who is

156. New INA § 274B(a)(1).

157. See *Joint Hearing*, *supra* note 136, at 95.

158. Cf. new INA § 274A(i).

159. New INA § 274B(d)(3).

160. New INA § 274B(a)(1)(A).

161. New INA § 274B(a)(1)(B), (a)(3).

not a U.S. citizen and does not intend to become one, could bring a charge under the Act if he or she was discriminated against because of his or her Mexican ancestry, but not if the discrimination was based on citizenship.

Under the INA a national of the United States includes "a person who, though not a citizen of the United States, owes permanent allegiance to the United States."¹⁶² 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.¹⁶³ The term has been applied primarily to inhabitants of territories acquired by the United States. It now affects an extremely limited number of persons, such as certain natives of insular possessions.

An alien must satisfy three requirements to qualify as an intending citizen. First, he or she must be a lawful permanent resident alien, newly legalized alien, refugee, or asylee.¹⁶⁴ Second, the alien must declare an intent to become a citizen.¹⁶⁵ The existing INS Form N-315 used for this purpose has fallen into disuse and is no longer available. Moreover, when it was in use, it could only be executed by legal permanent resident aliens, and only after they had filed, and the INS had approved, an "Application to File Declaration of Intent" (Form N-300).

Third, the alien must complete INS Form N-400, the application for naturalization.¹⁶⁶ This last requirement has strict time limits. All aliens who became eligible to apply for naturalization before November 6, 1986, the date of enactment, must have filed N-400 by May 5, 1987.¹⁶⁷ Aliens who become eligible to apply for naturalization after November 6 must apply within six months of the date of eligibility.¹⁶⁸ Failure to comply with these time strictures will result in losing all possible protection under the antidiscrimination provisions.

Unfortunately, these time limits are not very well-known. Lawyers would perform a real service for many of their former and current alien clients who are eligible for naturalization by contacting them and urging them to file Form N-400 promptly.

The definitions of citizen and intending citizen exclude some aliens from protection under the antidiscrimination provisions. Examples of such aliens include: (1) lawful permanent resident aliens who fail or do not intend to apply for naturalization within the six-month time limits; (2) aliens who

162. INA § 101(a)(22), 8 U.S.C. § 1101(a)(22) (1982).

163. See 3 C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 11.3b (rev. ed. 1985).

164. New INA § 274B(a)(3)(B)(i).

165. New INA § 274B(a)(3)(B)(ii).

166. New INA § 274B(a)(3).

167. *Id.*

168. *Id.*

have entered the U.S. on nonimmigrant visas; (3) aliens paroled into the U.S.; and (4) aliens in the U.S. on extended voluntary departure status.¹⁶⁹ The definition also excludes aliens who fail to obtain naturalization within two years after applying, unless they can show diligent pursuit of the application.¹⁷⁰ Potential ironies abound because of these limitations. For example, an alien who has unlawfully resided in the U.S. since before 1982 may qualify for legalization and eventually for naturalization. If the legalized alien applies for and obtains naturalization within the necessary time limits, he or she will be protected by the new law's antidiscrimination provisions.¹⁷¹ By contrast, an alien lawfully in the U.S. on an H-1 temporary worker visa for the same period of time is excluded from protection. Because the lawful temporary worker is not a U.S. citizen, an employer can discriminate against that alien based on citizenship without fear of violating the new law. Litigation may be needed to resolve these and other perceived inconsistencies in the statute's scope of coverage.

Exceptions. The Frank amendment contains five exceptions. First, section 274B's prohibitions against discrimination do not apply to "unauthorized alien[s]."¹⁷² The term "authorized alien" is defined only in the employer sanctions part of the law.¹⁷³ The same definition will undoubtedly apply to section 274B.

As explained above,¹⁷⁴ work authorization is a complex concept. For example, undocumented aliens who certify their eligibility for and intent to apply for legalization can receive temporary work permits through September 1, 1987.¹⁷⁵ Because of their interim work authorization, these aliens should be able to invoke the protections of section 274B if they are unlawfully discriminated against before their work permits expire.

A recent court decision confirms this view. In *League of United Latin American Citizens v. Pasadena Independent School District*¹⁷⁶ four undocumented alien school janitors were fired for using false social security numbers. All four were eligible for legalization under section 245A of the new law,¹⁷⁷ and each had been hired before November 6, 1986. The League

169. See *Immigration Control and Legalization Amendments: Hearings Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 127 (1985) (statement of Richard P. Fajardo, Acting Associate Counsel, Mexican American Legal Defense and Educational Fund).

170. New INA § 274B(a)(3)(II).

171. New INA § 274B(a)(3)(B)(i).

172. New INA § 274B(a)(1).

173. New INA § 274A(h)(3), discussed *supra* at text accompanying notes 9-10.

174. See *supra* text accompanying notes 10-16.

175. See *supra* text accompanying notes 14-16.

176. No. H-87-935 (S.D. Tex. April 14, 1987).

177. New INA § 245A generally allows undocumented aliens who have lived in the U.S. since before January 1, 1982 to apply for legalization.

of United Latin American Citizens sued on behalf of the four fired workers. The district court granted a preliminary injunction and ordered the janitors to be reinstated, holding that "[w]hen applied to those who are qualified for legalization, and who intend to become citizens, a policy of terminating undocumented aliens for no reason other than that they have given employers a false social security number constitutes an unfair immigration-related employment practice under § 274B(a) of the Act."¹⁷⁸ The decision greatly expands the number of aliens who can claim section 274B protection, and limits the applicability of the statute's exception for unauthorized aliens.

The second exception to the Frank amendment exempts small employers, defined as entities employing fewer than four employees.¹⁷⁹ The third exception permits an employer, recruiter or referrer to discriminate on the basis of an individual's national origin if the discrimination is allowed under section 703 of Title VII.¹⁸⁰ That section permits a discriminatory requirement that is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."¹⁸¹ Thus, for example, an employer can require applicants to take an English language aptitude test, if he can establish that it is a bona fide occupational qualification.¹⁸² Interestingly, this exception only applies to national origin discrimination, not to discrimination based on an individual's citizenship status.

The fourth exception allows an employer to discriminate based on citizenship status if such discrimination is otherwise required to comply with federal, state or local laws, regulations, or contracts.¹⁸³ This exception also applies if the Attorney General determines it "essential" that an employer employ only U.S. citizens in order to be able to do business with a federal, state, or local agency or department.¹⁸⁴ It will be interesting to see whether employers, in an effort to protect themselves from having to comply with the new law's antidiscrimination provisions, will attempt to persuade more government agencies to require the use of only U.S. citizens in government contracts.

178. Slip op. at 12.

179. New INA § 274B(a)(2)(A); *see also* 52 Fed. Reg. 9278 (Mar. 23, 1987) (proposed 28 C.F.R. § 44.200(b)(1)(i)).

180. New INA § 274B(a)(2)(B).

181. 42 U.S.C. § 2000e-2(e) (1982).

182. *See* H.R. CONF. REP. NO. 1000, *supra* note 17, at 88 ("nothing in this bill shall prevent the use of language as a Bona Fide Occupational Qualification").

183. New INA § 274B(a)(2)(C); *see also* *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding New York state citizenship requirement for its police forces). *See generally* *Joint Hearing*, *supra* note 136, at 414-17.

184. New INA § 274B(a)(2)(C).

The fifth statutory exception makes it lawful for a company or entity to prefer to hire, recruit, or refer a U.S. citizen or national over an alien "if the two individuals are equally qualified."¹⁸⁵ This exception was added on the House floor by Representative Daniel E. Lungren (R-CA). Congressman Lungren explained that when two applicants are equally qualified, an employer should be given discretion "for whatever reason to hire a citizen or national of the United States over another individual who is an alien."¹⁸⁶

The Lungren exception is limited in several respects. First, the exception applies only to hiring, recruitment, or referral, not to firings. Thus, an employer may not use this exception to discriminate unlawfully in laying off or firing workers.

Second, the employer has the burden of proof to show that the exception applies. The exception is structurally parallel to the bona fide occupational qualification defense under Title VII.¹⁸⁷ It is well established that employers have the burden of establishing this defense.¹⁸⁸ Representative Lungren recognized that "[an employer] would have to show [that the citizen and alien applicants] were equally qualified."¹⁸⁹

Third, 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.¹⁹⁰ Throughout the House floor debate, the scope of the exception was illustrated by examples of employers who were actually confronted with two equally qualified candidates.¹⁹¹ A *post hoc* showing of equal qualifications, based on the performance of the person hired, should 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 noncitizen appeared to be equally qualified based on valid criteria.

185. New INA § 274B(a)(4); see also 52 Fed. Reg. 9278 (Mar. 23, 1987) (proposed 28 C.F.R. § 44.200(b)(2)).

186. 132 CONG. REC. H9767 (daily ed. Oct. 9, 1986).

187. 42 U.S.C. § 2000e-2(e) (1982); see also *supra* text accompanying notes 180-82.

188. See, e.g., *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 232 (5th Cir. 1969).

189. 132 CONG. REC. H9767 (daily ed. Oct. 9, 1986).

190. See new INA § 274B(a)(4).

191. See 132 CONG. REC. H9767 (daily ed. Oct. 9, 1986) (Rep. Lungren: "if you have as an employer a citizen and noncitizen in front of you, equally qualified, and you are trying to make a decision"); *id.* at H9768 (Rep. Frank: "an employer who is faced with people of equal qualifications").

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

The Equal Employment Opportunity Commission (EEOC) has issued a policy statement warning employers about the Lungren exception and other aspects of the Simpson-Rodino Act.¹⁹² The policy statement notes that while the IRCA lawfully permits an employer to prefer a citizen over an authorized alien applicant who is equally qualified, such a preference may still violate Title VII if it has the purpose or effect of discriminating on the basis of national origin.¹⁹³ The EEOC statement also cites a number of hiring practices that might violate Title VII if used by employers in a misguided attempt to avoid the possibility of a fine or jail term under the employer sanctions provisions of the immigration law. These include hiring restrictions based on national background, citizenship, English fluency, foreign accent, aptitude tests, and height or weight, all of which are illegal if they hurt persons of a particular national origin and are not shown to be job-related.¹⁹⁴

Separate subdivisions. The Frank amendment contains the same language concerning treatment of separate subdivisions as does the employer sanctions section of the statute.¹⁹⁵ For both sections, physically separate subdivisions can be considered separate employers, recruiters, or referers if they meet certain criteria. The subdivisions must be physically separate and must do their own hiring, recruiting, and firing.¹⁹⁶ Each subdivision must not be under the control of or in common control with another subdivision.¹⁹⁷

The same incentive for large employers to decentralize their personnel functions to reduce penalty levels under the employer sanction provisions exists under the Frank amendment.¹⁹⁸ A first violation of the antidiscrimination provisions could result in a civil fine of up to \$1,000 and back pay for each individual discriminated against.¹⁹⁹ Subsequent violations could result in the same back pay award and a civil fine of up to \$2,000 per

192. EEOC Policy Statement: "Relationship of Title VII of the Civil Rights Act to the Immigration Reform and Control Act of 1986" (Feb. 26, 1987), *reported and reproduced in* 64 *Interpreter Releases* 383, 400-03 (1987) [hereinafter EEOC Policy Statement].

193. EEOC Policy Statement, *supra* note 192, at 4.

194. *Id.* at 2-4.

195. *Cf.* new INA § 274B(g)(2)(D) with new INA § 274A(e)(4). For a discussion of § 274A(e)(4), see *supra* text accompanying notes 101-07.

196. New INA § 274B(g)(2)(D); new INA § 274A(e)(4).

197. New INA § 274B(g)(2)(D); new INA § 274A(e)(4).

198. See generally *supra* text accompanying notes 101-07.

199. New INA § 274B(g)(2)(B)(iii), § 274B(g)(2)(B)(iv)(I).

individual.²⁰⁰ If a company's personnel operations are unified, this could increase its exposure for multiple violations and result in higher fines.

Statute of limitations. The IRCA imposes a 180-day statute of limitations for filing an immigration-related employment discrimination claim with the Office of the Special Counsel.²⁰¹ The Department of Justice did not name an Acting Special Counsel until April 21, 1987.²⁰² Thus, individuals who were victims of national origin or citizenship discrimination right after the law was enacted had little time to file their claims without running afoul of the statute of limitations.

The Justice Department's proposed antidiscrimination regulations fail to specify whether waiting more than 180 days to file a claim of immigration-related employment discrimination will absolutely extinguish all rights under the Frank amendment.²⁰³ Under Title VII, a person who fails to file a charge of discrimination within the stated time limits is ordinarily estopped from maintaining a cause of action, but this is considered a flexible standard and can be extended for equitable reasons.²⁰⁴ The proposed antidiscrimination regulations simply declare that a section 274B claim received more than 180 days after the alleged discrimination occurred shall be dismissed "with prejudice."²⁰⁵

Compliance. An employer, recruiter, or referrer can comply with the antidiscrimination provisions by keeping careful and complete records of all job applicants, even if they are rejected, and of all terminations. In this way the employer, recruiter, or referrer can document that he is not discriminating against Hispanics, other minority groups or aliens in his hiring or firing decisions. Because the Frank amendment became effective immediately upon enactment, this recordkeeping policy should be instituted immediately.

D. PRACTICE AND PROCEDURE

Generally. The statute sets forth only a skeletal outline of the practices and procedures for bringing, defending, appealing and enforcing immigration-related employment discrimination claims. The Justice Department's proposed implementing regulations generally add little to the statutory framework.

200. New INA § 274B(g)(2)(B)(iii), § 274B(g)(2)(B)(iv)(II).

201. New INA § 274B(d)(3).

202. 64 *Interpreter Releases* 490-91 (1987); cf. *New Immigration Law Mandates Justice to Create Counsel's Office It Didn't Want*, Legal Times, Oct. 27, 1986, at 2, col. 1 [hereinafter Legal Times article] (statement of William Bradford Reynolds, Assistant Attorney General for Civil Rights, that the Special Counsel's office would be in operation in late Spring 1987).

203. See generally 52 Fed. Reg. 9274-9280 (March 23, 1987). The proposed antidiscrimination regulations are analyzed and reproduced in 64 *Interpreter Releases* 377-80, 392-98 (1987).

204. See *Zipes v. Trans World Airways, Inc.*, 455 U.S. 385 (1982).

205. 52 Fed. Reg. 9278 (March 23, 1987) (proposed 28 C.F.R. § 44.301(d)).

The statute establishes the following structure. An individual alleging citizenship or national origin discrimination may file a complaint with the Special Counsel for Immigration-Related Unfair Employment Practices within the Department of Justice.²⁰⁶ The Special Counsel has 120 days to decide whether there is "reasonable cause to believe" the charge is true and whether to request a hearing before an administrative law judge (ALJ).²⁰⁷ If the Special Counsel declines to prosecute the matter, a private right of action is also possible.²⁰⁸

If after a hearing the ALJ finds a violation, he or she shall issue a cease and desist order.²⁰⁹ The ALJ may also require the employer, recruiter, or referrer to hire the affected individuals, with or without back pay and/or to pay a fine of up to \$1,000 per individual discriminated against.²¹⁰ Judicial review is possible in the relevant court of appeals.²¹¹

Who may bring a charge. Any person "adversely affected directly" by an unfair immigration-related employment practice may file a charge with the Special Counsel.²¹² The proposed implementing regulations fail to define "adversely affected."²¹³ Another person may also file a complaint on behalf of the discriminatee.²¹⁴ Presumably this will allow a union to file a charge on behalf of its members. An INS officer may also file a charge.²¹⁵ Finally, the Special Counsel may conduct an investigation on his own initiative and file a complaint before an ALJ.²¹⁶

Investigation of charges. The Special Counsel has 120 days to determine whether there is "reasonable cause to believe" that the charge of an unfair immigration-related employment practice is true.²¹⁷ The Special Counsel may have problems complying with this time limit. For example, the Equal Employment Opportunity Commission (EEOC), which inves-

206. New INA § 274B(b)(1); *see also* 52 Fed. Reg. 9278 (March 23, 1987) (proposed 28 C.F.R. § 44.300(c)).

207. New INA § 274B(d)(1); *see also* 52 Fed. Reg. 9278 (March 23, 1987) (proposed 28 C.F.R. § 44.303).

208. New INA § 274B(d)(2).

209. New INA § 274B(g)(2)(A); *see also* 52 Fed. Reg. 9279 (March 23, 1987) (proposed 28 C.F.R. § 44.308).

210. New INA § 274B(g)(2)(B).

211. New INA § 274B(i).

212. New INA § 274B(b)(1). A proposed optional form to provide the Special Counsel with the information necessary to investigate the discrimination claim is reproduced in 52 Fed. Reg. 9280 (March 23, 1987).

213. *See* 52 Fed. Reg. 9278 (March 23, 1987) (proposed 28 C.F.R. § 44.300(a)).

214. New INA § 274B(b)(1).

215. *Id.*

216. New INA § 274B(d)(1); *see also* 52 Fed. Reg. 9278-79 (March 23, 1987) (proposed 28 C.F.R. § 44.304).

217. New INA § 274B(d)(1); *see also* 52 Fed. Reg. 9278 (March 23, 1987) (proposed 28 C.F.R. § 44.303). The proposed regulations fail to define "reasonable cause to believe."

tigates Title VII claims, has been in existence for over twenty years and has numerous field offices, over 3,000 personnel, and an annual budget of over \$163 million.²¹⁸ By contrast, the Justice Department is budgeting only \$4.2 million and sixty positions for the Special Counsel's staff for immigration-related discrimination cases.²¹⁹ Yet despite its relative wealth of resources, the EEOC has been plagued with backlogs of almost 100,000 cases. This has resulted in the EEOC missing statutory deadlines. Such omissions have not been held to affect jurisdiction in subsequent litigation proceedings, however.²²⁰ It is to be hoped that similar failure by the Special Counsel to meet the deadline imposed by the IRCA will also not result in dismissal of a case.

If the Special Counsel fails to file a complaint before an ALJ within 120 days, the persons making the charge may file a private action directly with an ALJ.²²¹ However, to qualify for a private right of action, the charge must allege "knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity."²²² Whether this requirement is a subset of all citizenship and national origin discrimination charges, or effectively defines the universe of discrimination charges that may be brought under the Frank amendment, is a major point of controversy. The issue is discussed more fully below.

The statute sets no limitation on the length of time a complainant has to file a private action. The Justice Department's proposed implementing regulations would limit plaintiffs to ninety days from the end of the 120-day investigatory period to bring an action directly.²²³ The Justice Department justifies this ninety-day limitation as "reasonable . . . to avoid the filing of stale complaints."²²⁴ While it may be reasonable, the statute contains no such time constraint. A reviewing court might consider the proposed rule *ultra vires* on this point.

Another more practical reason exists for challenging the ninety-day limit. The rule assumes that the Office of the Special Counsel will have completed its investigation of the alleged discriminatory activity within 120 days. Yet if the experience of the new Special Counsel is anything like that of the EEOC, unfair immigration-related discrimination investigations could take much longer. According to Title VII experts, EEOC investigations often drag on for more than six months. If the Special

218. *Joint Hearing*, *supra* note 136, at 16, 23.

219. *See* 64 *Interpreter Releases* 29 (1987).

220. *See, e.g.*, *Cromcraft Corp. v. EEOC*, 465 F.2d 745 (5th Cir. 1972); *Washington v. TG&Y Stores Co.*, 324 F. Supp. 849 (W.D. La. 1971).

221. New INA § 274B(d)(2).

222. *Id.*

223. 52 Fed. Reg. 9278 (March 23, 1987) (proposed 28 C.F.R. § 44.303(c)).

224. 52 Fed. Reg. 9276 (March 23, 1987).

Counsel's office takes anywhere near that long to investigate section 274B discrimination claims, and if the proposed regulations are finalized without change, many plaintiffs would have to file a private action directly with an ALJ before the Special Counsel has completed its investigation, just to preserve their private right of action. A better rule would allow plaintiffs to file a private action with an ALJ within ninety days after the Special Counsel has finished its investigation.

Proving discrimination. The statute is essentially silent on how to prove discrimination under section 274B. Most commentators have assumed that the test would be the same as that in Title VII cases.²²⁵ A Title VII complainant must prove either "disparate treatment" or "disparate impact." "Disparate treatment" requires proof of an intent or a pattern or practice of discriminating against individuals on the basis of their race, religion, color, sex, or national origin.²²⁶ In a "disparate impact" case, the plaintiff alleges that a facially neutral test or employment criterion that disproportionately disqualifies a protected class from employment is not job related. Proof of discriminatory intent is not required in such cases.²²⁷ For example, consider a redheaded employer who hires only redheads. He has a benign intent: he does not intend to discriminate against anyone, he merely prefers redheads. That facially neutral employment criterion, however, has a disparate and adverse impact on minorities. No blacks, Hispanics, or Orientals are likely to be hired (unless they dye their hair red). Such a hiring standard would violate Title VII.

President Reagan's statement accompanying his signing of the bill rejects use of the "disparate impact" theory or recovery in the new immigration law. According to the President, section 274B requires proof that the defendant intended to discriminate against the complainant because of his national origin or citizenship status:

[A] facially neutral employee selection practice that is employed without discriminatory intent will be permissible under the provisions of section 274B. For example, the section does not preclude a requirement of English language skill or a minimum score on an aptitude test even if the employer cannot show a "manifest relationship" to the job in question or that the requirement is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," so long as the practice is not a guise

225. See, e.g., Congressional Research Service, Comparison of the Unfair Immigration-Related Employment Practice Provisions of the Immigration Control and Legalization Amendments Act of 1985 (H.R. 3080) with the Frank Amendment, Title VII of the Civil Rights Act of 1964, and the National Labor Relations Act 3 (1985) [hereinafter CRS Study].

226. See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

227. See e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

used to discriminate on account of national origin or citizenship status. Indeed, unless the plaintiff presents evidence that the employer has intentionally discriminated on proscribed grounds, the employer need not offer any explanation for his employee selection procedures.²²⁸

As authority for his view, the President relied in part on the portion of the statute allowing private rights of actions only for discrimination claims alleging "knowing and intentional" discrimination or a "pattern or practice" of such discrimination.²²⁹ The President would have this intent test applied to all discrimination claims brought under section 274B, not just private actions.

The Justice Department's proposed implementing regulations adopt the President's intent test.²³⁰ To constitute a violation of the antidiscrimination provisions, a person would always have to prove "knowing and intentional" discrimination.²³¹ According to the supplementary information part of the proposed rule, "[u]nder this standard it is not sufficient to allege that a pattern or practice of activity results in discriminatory effects."²³² Thus, the redheaded employer with the benign intent discussed above would not be found to violate section 274B, despite the discriminatory effects created by his employment practice. The proposed rule does acknowledge that discriminatory intent may be shown by circumstantial as well as by direct evidence, and that "statistics may be used in appropriate cases to aid in proving discriminatory intent."²³³

Representative Frank, the primary author of the antidiscrimination provisions, disputes the administration's characterization of the appropriate standard of proof.²³⁴ He contends that Congress intended to require an intent element only for private actions. Representative Frank has sub-

228. President's Statement on Signing S.1200 Into Law, 22 WEEKLY COMP. PRES. DOC. 1534, 1535 (Nov. 6, 1986), reprinted in 63 *Interpreter Releases* 1036-39 (1986) [hereinafter President's Statement]. For discussion of the proper significance to be attached to the President's signing statement, see Garber & Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363 (1987); Comment, *Judicial Deference to the Chief Executive's Interpretation of the Immigration Reform and Control Act of 1986 Antidiscrimination Provision: A Circumvention of Constitutionally Prescribed Legislative Procedure*, 41 U. MIAMI L. REV. 1057 (1987).

229. *Id.*

230. See 52 Fed. Reg. 9275, 9277-78 (March 23, 1987) (proposed 28 C.F.R. § 44.200(a)).

231. *Id.*

232. 52 Fed. Reg. 9275 (March 23, 1987).

233. *Id.*

234. See N.Y. Times, Nov. 7, 1986, at A12, col. 1; *Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. (Dec. 17, 1986) (statement of Rep. Frank). The December 17 hearing, at which Rep. Frank and a Justice Department official almost got into a shouting match over the intent issue, is summarized in 63 *Interpreter Releases* 1180-83 (1986).

mitted for the record various documents that he believes disprove the administration's view of the relevant legislative history.²³⁵

A 1985 Congressional Research Service study of the Frank amendment also supports Representative Frank's interpretation. The study noted that about two-thirds of all analogous labor actions brought under the National Labor Relations Act (NLRA) are found to lack merit.²³⁶ Moreover, even though a person may file an administrative appeal of a labor dismissal, only about four percent of dismissals are reversed.²³⁷ It may well be that Congress, aware of these statistics, decided to permit private actions only when intentional discrimination or a pattern or practice of discrimination is alleged.

Litigation seems necessary to resolve this issue. In the meantime, the administration's interpretation significantly narrows the scope of protection the Frank amendment provides.

Overlapping Title VII and immigration discrimination claims. Because both Title VII and the Frank amendment prohibit discrimination based on national origin grounds, the potential exists for two claims involving the same set of facts to be filed, one with the Special Counsel, and the other with the EEOC. The IRCA eliminates this possibility by generally prohibiting dual filings of discrimination charges based on the same set of facts.²³⁸ An exception exists if a charge filed with one agency is dismissed as being outside the scope of that agency's jurisdiction.²³⁹ This exception can be important. Suppose, for example, that a U.S. citizen of Hispanic origin files an action with the EEOC based on national origin discrimination, only to learn later that the employer does not fall within Title VII's jurisdictional guidelines (e.g., did not employ fifteen or more employees for each working day in each of at least twenty calendar weeks in the current or preceding calendar year). In that case, the exception to the dual filing bar will allow the citizen to refile the charge under section 274B.

Counting the number of employees. As stated above,²⁴⁰ Title VII applied only to employers who have fifteen or more employees "for each working day in each of twenty or more calendar weeks."²⁴¹ Section 274B

235. A copy of the materials Representative Frank submitted is on file with the authors.

236. CRS Study, *supra* note 225, at 6 (citing *Hearing on National Labor Relations Board Case Backlog Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 1st Sess. 144 (1983)).

237. *Id.*

238. New INA § 274B(b)(2). However, the Act does not bar a person from simultaneously bringing an administrative claim of unfair immigration-related employment practices and a complaint in federal court under a § 1981 theory.

239. *Id.*

240. See *supra* text accompanying notes 140-41.

241. 42 U.S.C. § 2000e(b) (1982).

contains no such language. In the case of national origin discrimination, it applies to all employers with between four and fourteen employees; for citizenship discrimination, it applies to all employers of more than three employees. The Justice Department's proposed rule to implement section 274B resolves the difference between the two statutes in two ways. First, the supplementary information part of the rule states that the Justice Department will not use the twenty-calendar-week requirement of Title VII for purposes of determining coverage under section 274B.²⁴² Second, the Department would count all part-time and full-time employees working on the day the alleged immigration-related employment discrimination occurred.²⁴³

Hearings. The statute requires a defendant to be given notice and an opportunity for a hearing before an ALJ.²⁴⁴ The person who filed the original charge with the Special Counsel is a full party to the proceedings, and may testify at the hearing.²⁴⁵ The employer/defendant must be given at least five days' notice of the hearing. The employer has a right to file a written answer to the discrimination complaint.²⁴⁶ The hearing must be transcribed, and the ALJ must issue a written decision based on a preponderance of the evidence.²⁴⁷ The ALJ has authority to issue subpoenas to compel the attendance of witnesses or the production of evidence.²⁴⁸

The Justice Department's proposed implementing regulations generally mirror the statutory language.²⁴⁹ In one good point, the proposed rule would mandate that all hearings before an ALJ be conducted pursuant to the Administrative Procedure Act (APA).²⁵⁰ The statute itself does not explicitly require APA procedures to be followed.

Penalties. The Special Counsel or the plaintiff must show by a preponderance of the evidence that the defendant has engaged in an unfair immigration-related employment practice.²⁵¹ If this burden is met, the ALJ must enter a cease and desist order.²⁵² The order may also require a first time offender to hire individuals discriminated against, with or without back pay, and/or to pay a civil penalty of up to \$1,000 per indi-

242. 52 Fed. Reg. 9275 (March 23, 1987).

243. *Id.*

244. New INA § 274B(e)(1).

245. *Id.*; see also H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 2. at 13 (1986).

246. New INA § 274B(e)(1).

247. New INA § 274B(g)(2)(A).

248. New INA § 274B(f)(2).

249. See 52 Fed. Reg. 9279 (March 23, 1987) (proposed 28 C.F.R. § 44.306).

250. *Id.* (proposed 28 C.F.R. § 44.306(f)).

251. New INA § 274B(g)(2)(A).

252. *Id.*; see also 52 Fed. Reg. 9279 (March 23, 1987) (proposed 28 C.F.R. § 44.308).

vidual.²⁵³ The civil fine increases for subsequent violations up to a maximum of \$2,000 per individual.²⁵⁴

The back pay liability is limited to two years prior to the date of filing the charge with an ALJ.²⁵⁵ Also, interim wages earned by the individual will reduce the amount of allowable back pay.²⁵⁶ Finally, the statute specifies that an ALJ cannot require back pay and/or the hiring of an individual if the person was refused employment on legitimate grounds as well as because of national origin or citizenship discrimination.²⁵⁷

Judicial review. A party has sixty days to appeal an ALJ's final order in a discrimination case.²⁵⁸ Appeal is to the U.S. court of appeals in which the employer resides or transacts business, or in which the violation allegedly occurred.²⁵⁹ This sixty-day time limit is fifteen more days than the period for filing an appeal concerning an employer sanctions or paperwork verification violation.²⁶⁰

Enforcing ALJ orders. An ALJ's finding of employment discrimination under section 274B is not self-enforcing. If a defendant fails to comply voluntarily with an ALJ's order, the Special Counsel or the complainant must petition the U.S. district court for enforcement.²⁶¹ The ALJ's order is not subject to review in an enforcement proceeding.²⁶²

The lack of self-execution may hinder speedy attainment of the relief sought. Labor cases brought before administrative authorities under the National Labor Relations Act are also not self-enforcing, and full litigation of such matters has often been quite lengthy.²⁶³

Attorney's fees. The statute specifically grants an ALJ or court of appeals discretion to award "a reasonable attorney's fee"²⁶⁴ to the prevailing party (other than the United States) if the losing party's argument is "without reasonable foundation in law and fact."²⁶⁵ This provision should provide an incentive to attorneys to accept immigration-related employment discrimination cases on behalf of individuals alleging discrimination. A word of caution is in order, however. Individuals should be careful to

253. New INA § 274B(g)(2)(B)(iii), (iv)(I).

254. New INA § 274B(g)(2)(B)(iv)(II).

255. New INA § 274B(g)(2)(C); see also 52 Fed. Reg. 9280 (March 23, 1987) (proposed 28 C.F.R. § 44.308(c)).

256. New INA § 274B(g)(2)(C).

257. *Id.*

258. New INA § 274B(i)(1).

259. *Id.*; see also 52 Fed. Reg. 9280 (March 23, 1987) (proposed 28 C.F.R. § 44.310).

260. *Cf.* new INA § 274A(e)(7).

261. New INA § 274B(j)(1).

262. New INA § 274B(j)(2).

263. See CRS Study, *supra* note 225, at 5.

264. New INA § 274B(h), (j)(4).

265. *Id.*; see also 52 Fed. Reg. 9280 (March 23, 1987) (proposed 28 C.F.R. § 44.309).

file only those discrimination cases under section 274B that they believe have a reasonable foundation. For example, about two-thirds of all charges in National Labor Relations Board cases are found to be without merit.²⁶⁶ As the President's statement makes clear, an alleged victim who loses his or her section 274B discrimination case may have to pay the employer's attorney's fees if it is determined that the victim's charge failed to have a reasonable foundation in both law and fact.²⁶⁷ Claimants should be particularly cautious about proceeding with a private action if the Special Counsel's office has determined through its initial 120-day investigation that no "reasonable cause" exists to believe that the charge is true.²⁶⁸

Section 274B's language concerning attorney's fees 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.²⁶⁹ This dual standard evidences congressional desire to encourage Title VII plaintiffs to pursue claims without the fear of an adverse fee award.

The role of the Justice Department. The Justice Department's proposed implementing regulations provide a litmus test for determining whether the antidiscrimination provisions of the new law will provide a viable remedy for victims of national origin or citizenship discrimination. The Justice Department opposed the Frank amendment before the law's enactment,²⁷⁰ and the President's statement exhibits particular hostility toward that section.²⁷¹ The proposed regulations generally construe the section narrowly. A question also exists whether the Department of Justice will enforce the antidiscrimination provisions vigorously. Assistant Attorney General Reynolds insists that the Department will be "fully responsible" in its enforcement of the Frank amendment.²⁷² Civil rights advocates say they will force the Department of Justice to be responsive if necessary.²⁷³

266. CRS Study, *supra* note 225, at 6.

267. President's Statement, *supra* note 228, at 2.

268. See new INA § 274B(d)(1); see also 52 Fed. Reg. 9278 (March 23, 1987) (proposed 8 C.F.R. § 44.303(b)).

269. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

270. See, e.g., *Joint Hearing*, *supra* note 136, at 184 (statement of Assistant Attorney General for Civil Rights William Bradford Reynolds).

271. See text accompanying *supra* notes 228-29.

272. Legal Times article, *supra* note 202, at col. 3.

273. *Id.*

E. GAO REPORTS AND TERMINATION OF THE FRANK AMENDMENT

The same three annual GAO reports required under the new law for employer sanctions purposes²⁷⁴ will also analyze whether employer sanctions have resulted in a pattern of national origin discrimination against "other than unauthorized aliens," or in a pattern of discrimination against U.S. citizens, national, or "eligible workers seeking employment."²⁷⁵ It is important to note that the GAO's reporting duty applies to discrimination against any aliens authorized to work, whether or not they are protected by the Frank amendment. Any evidence of discrimination against noncitizens 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, the IRCA, 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.

Congress has established two separate means by which the antidiscrimination provisions might terminate. First, if employer sanctions are repealed by a congressional joint resolution, the antidiscrimination provisions will also expire.²⁷⁶ Second, even if employer sanctions continue, the provisions against national origin and citizenship discrimination end if the last of the three annual GAO reports finds (a) that no significant employment discrimination has occurred because of employer sanctions or (b) that employer sanctions have created an unreasonable burden on employers, and if Congress then enacts a joint resolution within thirty days approving the GAO's findings.²⁷⁷ Given the political volatility of this issue, Congress is unlikely to adopt such a resolution, even if the GAO report finds no significant discrimination.

III. Conclusion

The IRCA creates an unavoidable tension for employers. On the one hand, they can now be penalized for knowingly hiring unauthorized workers. On the other hand, they can be penalized if they fire or refuse to hire authorized aliens or foreign-looking citizens. Careful verification and retention of the verification documents are key ingredients in establishing compliance with both the employer sanctions and antidiscrimination provisions of the new law.

274. See *supra* text accompanying notes 132-34.

275. New INA § 274B(j)(2), (j)(1)(B).

276. New INA § 274B(k)(1).

277. New INA § 274B(k)(2).

Employers should exercise caution before changing their personnel practices. Mass layoffs of foreign-looking employees by an employer in a mistaken effort to attempt to comply with the ban on employing unauthorized workers might subject the employer to penalties for violating Title VII and/or the Frank amendment. Employers should not panic.

In the long run, as a practical matter employers may need to worry more about complying with the antidiscrimination provisions than with the employer sanctions and paperwork requirements. The INS has limited enforcement capabilities, even with the increased funding authorized by Congress in the 1986 Act. For example, the Service currently has just forty-five agents assigned to the seven-county area surrounding Los Angeles, down from 130 in 1979.²⁷⁸ Similarly, the number of investigative agents in the New York INS office has dropped from 240 in 1981 to 82 today.²⁷⁹ Few experts expect INS investigations or verification checks to be very frequent or rigorous.²⁸⁰ By contrast, the potential for a private right of action, combined with attorney's fees, may help ensure that the antidiscrimination provisions are enforced. Much will depend, however, on how the Justice Department actually implements its regulations.

278. *Few Employers Fear New Immigration Law*, Washington Post, Nov. 15, 1986, at A3, col. 1.

279. *At INS Office, Change in Focus Breeds Dissension*, Newsday, Feb. 24, 1987, at 9.

280. *Id.* See also N.Y. Times, Jan. 20, 1987, at A1, col. 6 (INS statement that its initial enforcement activities will focus on large employers, companies with a history of hiring undocumented aliens and those with a history of wage and hour violations).

