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THE FRANK AMENDMENT TO THE IMMIGRATION REFORM AND CONTROL ACT OF 1986—A LABYRINTH FOR LABOR LAW LITIGATORS

Richard M. Kobdish*

On November 6, 1986, President Reagan signed the first major piece of immigration legislation to reach the White House in the last third of the century: the Immigration Reform and Control Act of 1986.¹ The media has widely covered this law, but thus far the main focus of the reportage has been on the Act's provisions that allow for the legalization of unlawful aliens and for sanctions against employers who hire illegals. Less widely covered have been features that, for the first time, establish employer "unfair immigration-related employment practices," which raise the spectre of extensive litigation and substantial monetary liability.

The reach of this Act's employment discrimination provisions is one of the broadest Congress has ever enacted, as it covers every employer that employs more than three persons. Broader still are its verification and sanction terms, since they apply to every person or entity with one or more employees. No one knows for sure how many illegals are presently in this country. Since over sixty percent of these illegals reside in states that share a border with Mexico, however, this new statute could substantially impact labor relation and human resource issues in Texas and in the rest of the Southwest.

While the Immigration Reform and Control Act of 1986 may also bring widespread social changes in those areas of the United States where illegals have tended to settle, that chapter of the story on immigration reform will take years to unfold. What can now be analyzed is the enforcement mechanism of this new Act, which promises to be a prolific source of employment law litigation for the foreseeable future. Although employer monetary sanctions for hiring illegals is the first enforcement cornerstone of the new Act, its second, unfair immigration-related employment practices, may generate much more litigation. This Article constitutes an early analysis of the unfair immigration-related employment practices provisions of the Immigration Reform and Control Act of 1986.

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I. THE "FRANK AMENDMENT"—ITS RECENT ORIGINS AND RATIONALE


An examination of the proceedings of the Ninety-Eighth Congress provides the most recent and relevant starting point for an analysis of what today are the unfair immigration-related employment practices provisions of the 1986 Act. During the June 12, 1984, House floor debate concerning one of the then-current versions of immigration reform, Representative Augustus Hawkins (D-Calif.) offered Amendment No. 4, which was designed to address certain employer discrimination that could result from the employer sanctions portion of the bill. Among the arguments against the Hawkins amendment was one that raised the point that while the amendment provided for the establishment of a kind of NLRB\(^3\) in the Department of Justice to investigate and prosecute immigration-related discrimination, the amendment also weakened penalties under the bill.\(^4\) Following discussion, the House defeated the Hawkins amendment by a vote of 253 to 166.

Shortly thereafter, Representative Barney Frank (D-Mass.) introduced Amendment No. 6, which, like the defeated Hawkins amendment, provided for an enforcement mechanism patterned after the one contained in the National Labor Relations Act.\(^5\) In distinction, however, Amendment No. 6 also contained penalties for discriminatory conduct that were "actually stiffer than the sanctions [that] are on the employer sanction side of the picture."\(^6\) With very little debate, the House passed Amendment No. 6 on a vote of 404 to 9.

Following the defeat of immigration reform in the Ninety-Eighth Congress, what has now come to be commonly known in the 1986 Act as the "Frank Amendment" surfaced again, with a totally different enforcement mechanism, in the first session of the Ninety-Ninth Congress.\(^7\) The only joint hearing ever held on the Frank Amendment took place on October 9, 1985.\(^8\)

B. The Stated Rationale for the Frank Amendment

Throughout the 1986 Act's legislative history, both those who favored the legislation, and those who opposed it, expressed the fear that employer sanctions for hiring illegal aliens, particularly criminal sanctions, would cause

\(^3\) See 29 U.S.C. § 153 (1982). This provision establishes the National Labor Relations Board [hereinafter NLRB].
widespread discrimination against citizens who were minorities, or against
aliens who were legally in this country. In devising remedies for the per-
ceived potential evils, the House was aware that title VII of the 1964 Civil
Rights Act already made employment discrimination on the basis of na-
tional origin illegal. Title VII is limited, however, in that it covers only em-
ployers with fifteen or more employees, a restriction that eliminates
approximately half of the employing enterprises in the United States. More-
over, only those employees who work twenty or more calendar weeks per
year come within the ambit of title VII, thus removing from its coverage
many people who work in highly seasonal industries, such as agriculture.

In addition, as interpreted by the Supreme Court in Espinoza v. Farah
Manufacturing Co., title VII's ban on national origin discrimination does
not mean that discrimination on the basis of citizenship or alienage per se is
unlawful. While the Court in Espinoza expressly declined to decide the
issue of whether the Civil Rights Act of 1866 prohibits discrimination by
private employers on the basis of citizenship, lower courts' subsequent deci-
sions have split on this issue. These decisions have created inconsistencies
in employment discrimination law.

9. For example, Representative Hawkins, speaking in the second session of the Ninety-
Eighth Congress on behalf of his unsuccessful amendment to House Report 1510, stated that
"there are those in this Nation who would use this measure as a pretext to deny employment to
United States citizens and aliens lawfully residing here and by right, simply because they look
or sound foreign." 130 CONG. REC. H5617 (daily ed. June 12, 1984) (statement of Rep. Haw-
kins). Representative Robert Garcia's (D-N.Y.) opinion proved illustrative of the many other
opinions expressed along these same lines at the Joint Hearing when he stated that:

[People like myself, who are being lumped together with undocumented per-
sons [will be discriminated against] simply because of the way we look or the
way we may sound. . . . I am also certain that most [employers will not be]
trying to be vindictive or discriminatory. They [will be] simply trying to protect
themselves. They [are not] attorneys; they don't understand the details of the
law. . . . These people have businesses to run, and their first instinct is not to
worry about whether or not they are being discriminatory; they worry instead,
about fines that affect their profits.

While I'm against sanctions for those reasons, it's not the bigots that truly
concern me. . . . No, it's the ordinary, the small business persons, who aren't
going to want to take any chances, because, frankly, they can't afford to. But if
sanctions are to be, then the anti-discrimination provisions in this bill must re-
main. Those provisions, at least, offer some protection for members of my com-
munity who would, inevitably be discriminated against if this bill becomes law.

Joint Hearing, supra note 8, at 119-20. For one contrary view, see the testimony of Paul
Grossman, Esq. Id. at 225.


11. Id. § 2000e(b).

12. Id.


14. Id. at 95. The United States Supreme Court noted, however, that "a citizenship re-
quirement might be but one part of a wider scheme of unlawful national-origin discrimi-
nation." Id. at 92; see Equal Employment Opportunity Commission Guidelines on


16. 414 U.S. at 96 n.9.

(claim of alienage discrimination may be available under section 1981) with Rios v. Marshall,
under section 1981).
Because of these perceived inconsistencies in existing law, Congress, while considering the 1986 Act, saw the need to strengthen the protections against national origin and citizenship discrimination if immigration reform was to contain both civil and criminal employer sanctions. Rather than amend title VII and thereby entrust to the Equal Employment Opportunity Commission the investigation of discrimination claims raised by immigration reform, Congress elected instead to establish an entirely new set of definitions, conditions, and procedures. On March 23, 1987, the Department of Justice issued a Notice of Proposed Rulemaking, which set forth enforcement procedures and standards for the unfair immigration-related employment practices provision of the 1986 Act. With a few exceptions that will be discussed below, the Proposed Regulations merely repeat the literal language of the Act itself. They shed little light upon the many inconsistencies and ambiguities contained in the 1986 Act.

II. AN ANALYSIS OF THE FRANK AMENDMENT: 8 U.S.C.S. § 1324b

A. Sections 1324b(a)(1)(A) and (B): “General Rule”

Sections 1324b(a)(1)(A) and (B) make it unlawful to discriminate in the employment or in the termination of employment of any individual (other than an unauthorized alien) because of his or her national origin, or, in the case of a citizen or “intending citizen,” because of his or her citizenship status. Through this language, Congress has created an entirely new cause of action for alleged employment discrimination. Congress has modified the Supreme Court’s holding in Espinoza that an employer who comes within the scope of title VII may legally refuse to hire noncitizens, unless such a criterion is found to be a pretext for national origin discrimination. Under section 1324b, with certain exceptions, no employer of more than three employees may legally maintain this employment standard. Further, section 1324b(a)(1)(A) expands the federal ban against national origin discrimination. While title VII covers only employers of fifteen or more employees, national origin discrimination covers a much broader universe of individuals under the 1986 Act. Specifically, the Act picks up those who work for employers employing four to fourteen people.

On the other hand, the scope of protection provided by section 1324b appears much narrower than that in the title VII context. Title VII makes it unlawful to discriminate with respect to “compensation, terms, conditions, or privileges of employment.” These terms create a very broad collection of employment rights. Section 1324b(a)(1), however, specifically refers only “to the hiring, or recruitment or referral for a fee” or the “discharging” of

19. Id.
an individual. Consequently, one may make a strong argument that under section 1324b entities employing between four and fourteen people may, after an individual is hired, treat that person less favorably than nonminorities in promotional opportunities, raises, and the like, solely because of the person's national origin. Likewise, citizens or "intending citizens"24 might also suffer such discriminatory treatment after they are on such an entity's payroll. No doubt much litigation will arise in attempts to clarify this confusing situation.

B. Sections 1324b(a)(2)(A), (B), and (C): "Exceptions"

Sections 1324b(a)(2)(A), (B), and (C) detail statutory exceptions to the bans on unfair immigration-related employment practices discussed above. Section 1324b(a)(2)(A) excludes from coverage employers of three or fewer employees. Section 1324b(a)(2)(B) states that national origin discrimination covered by section 703 of title VII25 is not an unfair immigration-related employment practice for purposes of the bill. Finally, section 1324b(a)(2)(C) provides that the 1986 Act does not render unlawful that citizenship discrimination that is mandated by federal, state, or local law, or by government contract, or determined by the Attorney General to be "essential for an employer to do business"26 with a governmental agency or department.

Accordingly, one effect of sections 1324b(a)(2)(A) and (B) is to lower the threshold of coverage with respect to national origin discrimination, so as to include those entities that employ between four and fourteen persons. Section 1324b(a)(2)(B) contains, however, other significant points for consideration. Section 703(c) of title VII,27 for instance, states that, with respect to religion, sex, or national origin, discrimination in employment is permitted "where religion, sex, or national origin is a bona fide occupational qualification28 reasonably necessary to the normal operation of that particular business or enterprise."29 Courts have generally construed this BFOQ exception to title VII narrowly,30 and one could argue that section 1324b(a)(2)(B) incorporates into immigration-related employment practices these same narrow title VII BFOQ defenses. As an example, although not strictly a BFOQ question, federal courts in a title VII context have permitted a criterion that an applicant or employee must have the ability to speak the English lan-

24. See infra notes 35-44 and accompanying text.
28. Hereinafter BFOQ.
30. See, e.g., Hardin v. Stynchcomb, 691 F.2d 1364, 1370 (11th Cir. 1982) (courts should construe BFOQ exception narrowly, and party attempting to use exception carries burden of proving its validity); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 387 (5th Cir.) (EEOC guidelines dictate that courts construe BFOQ exception narrowly, in order that exception not swallow rule); cert. denied, 404 U.S. 950 (1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969) (legislative history indicates that Congress intended courts to construe BFOQ exception narrowly).
guage where such a requirement had a reasonable business justification and was not overly broad in coverage. 31

Yet, if Congress had intended title VII’s BFOQ defenses to apply to the 1986 Act, it clearly could have so stated. By its literal terms, all section 1324b(a)(2)(B) does is leave to the title VII statutory scheme the prevention of national origin discrimination by employers of fifteen or more employees. The provision says nothing about whether BFOQs or other title VII defenses apply to alleged violations of the 1986 Act.

Indeed, House Report 3810 at one time contained a section, which would have followed section 1324b(a)(2)(C), that clearly exempted from unfair immigration-related employment practices discrimination based upon a person’s proficiency in using the English language in those situations where such language proficiency constituted a BFOQ. This provision, however, did not survive the 1986 House-Senate Conference. Accordingly, a person may argue that no BFOQs exist for national origin discrimination under the 1986 Act, and, therefore, an English language proficiency job requirement is not a defense to a charge of national origin discrimination by small employers covered by the new bill, while the same requirement would still be a valid defense for those larger employers subject to title VII. In any event, regardless of whether national origin BFOQ defenses are available to employers under the 1986 Act, section 1324b(a)(2)(B) does not apply to discrimination against citizens or intending citizens, and no such defenses exist under the 1986 Act with respect to those two protected classes.

Finally, section 1324b(a)(2)(C) permits discrimination based on citizenship status, when citizenship constitutes a condition precedent to employment pursuant to a law or government policy, or when the Attorney General determines such an employment criteria to be essential for an employer to do business with the government. 32 This exception, therefore, allows the government to discriminate on the basis of citizenship in its own employment decisions 33 and permits certain government contractors to hire only citizens. Curiously, in Espinoza the Supreme Court found citizenship discrimination per se to be outside the protection of title VII partly on the grounds that to include citizenship in an interpretation of the term national origin “would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy. This Court cannot lightly find such a breach of faith.” 34 The public may speculate whether in a future title VII case the

Court might come to a different conclusion, since under the 1986 Act Congress has made it unlawful for employers to do what the federal government practices on a regular basis.

C. Sections 1324b(a)(3)(A) and (B): "Definition of Citizen or Intending Citizen"

As discussed above, the antidiscrimination provisions of the 1986 Act apply to both United States citizens and intending citizens. The former class of protected persons is self-explanatory, and Congress gave it little statutory attention. The latter protected class, however, is defined in detail in one of the more confusing sections of the 1986 Act.

For an alien to be considered an intending citizen and, therefore, protected from discrimination under section 1324b(a)(3)(B), he or she must satisfy numerous rigid filing qualifications and deadlines. First, the individual must stand as either a lawful permanent resident alien, a refugee, an asylee, or a newly legalized alien. In addition, for an alien to qualify as an intending citizen, he or she must demonstrate his or her desire to be a citizen of the United States by completing a declaration of intention to become a citizen. Also, such a person must, within six months of eligibility, complete an application for naturalization. Those aliens who became eligible to apply for naturalization before November 6, 1986, had until May 5, 1987, to apply for naturalization. Aliens who achieve eligibility after November 6, 1986, have six months from their date of eligibility to apply for naturalization. The alien's failure to meet these deadlines deprives him or her of intending-citizen protection from job discrimination. Furthermore, an alien who has met all of the procedural and temporal requirements, but has not been naturalized as a citizen within two years of application, likewise forfeits intending-citizen protection. Delays in paperwork processing caused by the Immigration and Naturalization Service are not counted in this two-year period. This section appears highly subjective and will likely generate much litigation in the future.

35. See supra note 20 and accompanying text.
37. Id. § 1324b(a)(3)(B)(i).
38. Id. subsection (ii). The declaration of intent to become a citizen is embodied in INS Form N-300.
39. Id. INS Form N-400 constitutes the application for naturalization.
40. See id. The 1986 Act's effective date was November 6, 1986. The statute provides that aliens must apply for naturalization within six months of being eligible, or if the alien had been eligible for longer than six months, "within six months after the date of enactment of this section." Id. § 1324b(a)(3)(B) (Law. Co-op. 1987).
41. Id.
42. Id.
43. Hereinafter INS.
D. Section 1324b(a)(4): “Additional Exception Providing Right to Prefer Equally Qualified Citizens”

As previously stated, in the Ninety-Eighth Congress’s Frank Amendment to House Report 1510 the House reacted to the Supreme Court’s Espinoza decision by making discrimination against citizens or intending citizens an unfair immigration-related employment practice. The House took up the merits of this issue again, however, during the debates of the Ninety-Ninth Congress when Representative Daniel Lungren (R-Calif.) offered his Amendment No. 5. That amendment, which is now section 1324b(a)(4) of the 1986 Act, added an additional exception by making it lawful for an employer to prefer a United States citizen over an alien “if the two individuals are equally qualified.”

Obviously the words “equally qualified” constitute the key portion of section 1324b(a)(4). Representative Lungren, the author of this section, confirmed that a determination of this issue in a particular case will often be left to the litigation process established by the 1986 Act.

In the context of other federal statutes designed to remedy employment discrimination against minorities, the courts have often tended toward a statutory construction that affords victims of prohibited discrimination the maximum protection. For example, in Weeks v. Southern Bell Telephone & Telegraph Co. the court had to decide the availability of title VII’s BFOQ defense to an employer who precluded females from holding jobs that involved lifting loads in excess of 30 pounds. In regard to its conclusion that such a BFOQ defense was not applicable, the court stated that “when dealing with a humanitarian remedial statute which serves an important public purpose, it has been the practice to cast the burden of proving an exception to the general policy of the statute upon the person claiming it.” This case law questions the accuracy of Representative Lungren’s comment that “doubt would be resolved in favor of the employer.” Given that the 1986 Act for the first time provides protection from discrimination to aliens that are intending citizens, employers giving preference to a United States citizen over such a newly protected person may be subject to close scrutiny in litigation.

45. See supra note 20 and accompanying text.
   I assume the person who would finally make the determination would be the governmental structure that has been set up in the Frank amendment. . . . It will only come up if an action were taken against an employer. He would have to show they were equally qualified.
   I would say in most cases, I would hope that the doubt would be resolved in favor of the employer to make the decision as to equal qualifications.
   Id.
50. 408 F.2d 228 (5th Cir. 1969).
51. Id. at 232 (citing A.H. Phillips, Inc. v. Walling, 324 U.S. at 493).
E. Section 1324b(b)(1): "Charges of Violations—In General"

Section 1324b(b)(1) of the 1986 Act allows persons charging unfair immigration-related employment practices to file such a charge with a "Special Counsel" within the Department of Justice.53 The individual allegedly suffering from the discrimination, any person or organization acting on his or her behalf, or the INS may file the charge.54 Pursuant to the 1986 Act's direction, the Attorney General, in his Proposed Regulations, has developed charge forms for the charging party to fill out and file with the Special Counsel.55 Within ten days of receipt of the charge form, the Special Counsel should serve a copy of such form upon the employer.56

The ten-day requirement for the service of charges may possibly present the most prolific area of litigation under section 1324b(b)(1). Arguably, however, this provision offers another parallel that may be drawn between the 1986 Act and title VII. Subsections 706(b) and (e) of title VII57 likewise have ten-day service requirements. The courts, however, generally have held that the EEOC's failure to serve a charge within such statutory periods does not create a jurisdictional impediment to a subsequent private action.58 Accordingly, in litigation under the 1986 Act, one might anticipate that the Special Counsel's failure to follow the technical requirements of section 1324b(b)(1) will not result in an administrative law judge's59 dismissal of a complaint.

F. Section 1324b(b)(2): "No Overlap with EEOC Complaints"

Obviously, great potential exists for tension and overlap between the 1986 Act's discrimination provisions and those contained in title VII. For example, both statutes prohibit national origin discrimination, with title VII applying to employers of fifteen or more persons, and the 1986 Act to employers of between four and fourteen.60 The applicable statutory scheme in a given case may become extremely important to the respective parties. To illustrate, an employer might prefer the coverage of title VII because of the discovery and other procedural rights available under the Federal Rules of Civil Procedure that litigants possess in federal district court lawsuits brought pursuant to that statute. On the other hand, a person charging discrimination might prefer to have his or her claim considered under the 1986 Act since its litigation procedures may cost less for the charging party.

54. Id.
55. Proposed Regulations, supra note 18, app. A.
56. Id. § 44.301(e).
58. See, e.g., Smith v. American President Lines, Ltd., 571 F.2d 102, 107 n.8 (2d Cir. 1978) (omission on the part of the EEOC to file timely charges did not bar plaintiff's suit); Johnson v. ITT-Thompson Indus., 323 F. Supp. 1258, 1260 (N.D. Miss. 1971) (failure of EEOC to attempt conciliation does not bar private suit).
59. Hereinafter ALJ.
60. See supra notes 11, 22 and accompanying text.
Accordingly, the determination of whether the employing enterprise employs fifteen persons or more becomes important. This task may not be as simple as it appears at first glance, since the House Committee on the Judiciary Report on House Report 3810 states that it did not intend the sanction portion of the 1986 Act to apply to "casual hires." Assuming that casual hires likewise may not be counted as employees for purposes of determining whether national origin discrimination falls under the 1986 Act or title VII, this provision also appears pregnant with litigation possibilities.

In an attempt to minimize the potential for overlap and forum shopping, section 1324b(b)(2) states that a party cannot file an unfair immigration-related employment practice charge if the party has also filed a title VII charge under the same set of facts, and vice versa. When a charge is dismissed as being outside the scope of the forum initially chosen by the aggrieved individual, however, section 1324b(b)(2) does allow for the filing of a second charge in the alternative forum. An employer, therefore, may have to defend its actions in a particular circumstance both before the Special Counsel appointed under the 1986 Act and before the EEOC. Simultaneous defenses under these two statutes, however, will not be required.

Finally, in many situations the distinction between national origin discrimination and discrimination based upon citizenship will be difficult to ascertain. Both typically will involve a minority noncitizen failing to obtain desired employment, or losing his or her position. As recognized by section 1324b(b)(2), both will often arise under the same set of facts. For these reasons, and because a 1986 Act action for citizenship discrimination applies to all employers, regardless of size, noncitizen minorities are likely to choose the 1986 Act.

G. Sections 1324b(c)(1)-(4): "Special Counsel, Appointment, Duties, Compensation, and Regional Offices"

The 1986 Act provides for the President to appoint, with the advice and consent of the Senate, a Special Counsel for Immigration-Related Unfair Employment Practices within the Department of Justice. This person will serve a four-year term. His or her duties include the investigation of discrimination charges and the prosecution of complaints before ALJs. The statute also directs the Special Counsel to establish regional offices around the United States in order to assist in the carrying out of his or her duties.

Authorities in the field have estimated that substantially more litigation...
and other activity will arise under the unfair immigration-related employment practices provisions of the 1986 Act than under its section 1324a, which deals with verification and sanctions.69 Yet, the Congressional Budget Office's July 15, 1986, report submitted to the House Committee on Ways and Means, estimated $422 million were necessary in increased appropriations for the INS so that, among other things, it could enforce employer sanctions under the 1986 Act.70 In that same report, however, the Congressional Budget Office estimated a cost of only two million dollars to attach to the activities of the Special Counsel and, even in that regard, stated that "the bill does not . . . authorize appropriations for this activity."71 This budget constraint may result in overt pressures and tensions in the next year given the widely held opinion that the office of the Special Counsel will necessarily become a large unit.72 Indeed, in testimony before the Joint Committee on House Report 3080, the Department of Justice opposed the bill, in part, because it would create a new expensive governmental organization.73

H. Section 1324b(d)(1): "Investigation of Charges by Special Counsel"

Section 1324b(d)(1) of the 1986 Act requires the Special Counsel to investigate each charge and, within 120 days of receipt of the charge, to make determinations of whether reasonable cause exists to believe the charge is true and whether to bring a complaint before an ALJ.74 The 1986 Act possesses no guidelines relative to the procedures that the Special Counsel must follow. Presumably, the office of this Special Counsel will eventually issue its own rules, regulations, and statements of procedure. With respect to the Special Counsel's charge investigation powers, however, the Proposed Regulations state that, among other things, he or she "may propound interrogatories, requests for production of documents, and requests for admissions."75 The Proposed Regulations grant no such discovery privileges to respondents in litigation of charge allegations.76

Furthermore, because the statutory scheme of the Frank Amendment borrows from the procedures set forth in both title VII and in the NLRA, and since both the EEOC and the General Counsel of the National Labor Relations Board77 investigate employment discrimination charges, one may make

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69. See id. § 1324a. A relatively recent edition of Interpreter Releases stated: "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. . . . [T]he potential for a private right of action, combined with attorney's fees, should help ensure that the antidiscrimination provisions are enforced." 63 Interpreter Releases 1057 (Nov. 17, 1986).


71. Id.

72. Joint Hearing, supra note 8, at 221 (testimony of Paul Grossman).

73. Id. at 184.

74. 8 U.S.C.S. § 1324b(d)(1) (Law. Co-op. 1987). For a more detailed discussion of the section of the 1986 Act dealing with the designation of ALJs, see infra notes 114-117 and accompanying text.

75. Proposed Regulations, supra note 18, § 44.302(a).

76. Id.

77. Hereinafter NLRB.
certain assumptions with regard to the procedures that will be followed by the Special Counsel. For example, the Special Counsel possibly may not comply with the 1986 Act's 120-day investigatory deadline. The EEOC has existed for more than twenty years, possesses numerous field offices staffed with experienced personnel, has some 3,000 persons on its payroll, and enjoys a budget of over $163 million. Nevertheless, case backlogs, occasionally approaching the 100,000 level, have plagued that agency over the years. Obviously, such a workload has often resulted in the EEOC's exceeding statutory deadlines, but courts have not held that such omissions affect jurisdiction in subsequent litigation proceedings. One may expect similar results with respect to the 120-day deadline placed upon the Special Counsel. Also, the Special Counsel will likely develop procedures for such items as negotiated settlements, fact-finding conferences, and the acceptance of a respondent's evidentiary and position statements. Both the EEOC and the NLRB General Counsel utilize some, or all, of these procedures in the processing of charges brought under their respective statutes.

I. Section 1324b(d)(2): "Private Actions"

The private action portion of the 1986 Act states that if, after passage of the 120-day investigation period discussed above, the Special Counsel has not filed a complaint with an ALJ alleging "knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity," the person aggrieved may file his or her complaint directly with the ALJ. This section 1324b(d)(2) presently evidences, and will likely remain, one of the most controversial portions of the statute. For example, in his statement accompanying the signing of the 1986 Act, President Reagan said that the reference to "intentional discriminatory activity" in section 1324b(d)(2) means that use of the disparate impact theory developed under title VII will be improper. He went on to state that "a facially neutral employer selection practice that is employed without discriminatory intent will be permissible under the provisions of Section 274B . . . [and] unless the plaintiff presents evidence that the employer has intentionally discriminated on prescribed grounds, the employer need not offer any explanation for his employee selection procedures." Representative Frank, the author of the amendment of the same name, recently disagreed with the President's statement and argued that a victim of discrimination under the 1986 Act does not

78. Joint Hearing, supra note 8, at 15-16, 23.
79. See Chromcraft Corp. v. EEOC, 465 F.2d 745, 747-48 (5th Cir. 1972) (absent showing of prejudice, EEOC's delay of filing charges due to backlog not bar to suit); Washington v. TG&Y Stores Co., 324 F. Supp. 849, 854-55 (W.D. La. 1971) (absent showing of prejudice, delays in filing not per se unreasonable).
81. Id.
83. Id.
have to prove discriminatory intent.84

One possible explanation for these widely divergent points of view presented itself in the President's statement on the 1986 Act in which he observed that, with regard to the types of action that may be brought pursuant to section 1324b(d)(2), "paragraph (d)(2) refers to 'knowing and intentional discrimination' and 'a pattern or practice of discriminatory activity.'"85 Yet, instead of the italicized "and," the bill itself connects the phrases "knowing and intentional discrimination" and "a pattern or practice of discriminatory activity" with the word "or," not "and." One may argue that instead of the 1986 Act's referring to a single cause of action theory that requires pattern or practice cases to be committed "knowing[ly]" and "intentional[ly]," the applicable provision sets forth two separate and distinct cause of action theories. The first theory involves individual discriminatory events that persons must commit knowingly and intentionally in order to be unlawful. The second cause of action theory concerns those pattern or practice activities that typically arise in class-type cases. This interpretation appears consistent with the overall approach of section 1324b, which borrowed some provisions from the NLRA,86 but even more from title VII.87 Supporters of this position note that title VII case law makes intent to discriminate the most relevant factor in disparate treatment cases, or matters that ordinarily involve a single claimant.88 They suggest that, since Congress borrowed so much else for section 1324b from title VII, ALJs and subsequent reviewing courts will show a strong tendency to apply title VII's burden of proof standards to unfair immigration-related employment practice allegations. The allocation of litigation proof, as developed in the title VII context, is divided into three components: (1) plaintiff's establishment of a prima facie case; (2) defendant's rebuttal through articulation of a legitimate, nondiscriminatory reason for the employment decision; and (3) plaintiff's proof that the reason advanced by the defendant was a pretext for intentional discrimination. The plaintiff at all times has the burden of persuasion.89

In contrast to title VII's disparate treatment theory, proof of discrimination under title VII's adverse impact theory focuses on the effects of employment practices, rather than the underlying intent. This theory generally involves situations where a facially neutral standard disproportionately im-

85. President's Statement, supra note 82, at 2 (emphasis added).
86. See supra note 5.
87. See supra note 10 and accompanying text.
88. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). The United States Supreme Court in International Brotherhood of Teamsters stated that "'[d]isparate treatment'... is the most easily understood type of discrimination. ... Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." 431 U.S. at 335 n.15.
The imposition of a requirement that all applicants for employment possess a U.S. passport would provide an example of a disparate impact-type employment standard that courts may construe as having an unlawfully discriminatory impact under the 1986 Act, notwithstanding its benign intent.

A complicating factor to the analysis of section 1324b(d)(2) arises in that, in discussing the "pattern or practice" language contained in the criminal penalty portion of section 1324a, the Report of the House Committee on the Judiciary stated an intent that decisional standards reached through litigation involving other statutes be applied to the 1986 Act. The cases cited in the Committee's report indicate that the term 'pattern or practice' has its generic meaning and shall apply to regular, repeated and intentional activities, but does not include isolated, sporadic or accidental acts. The Committee Report then added that persons should apply such an interpretation to the unfair immigration-related employment practices provisions of the bill. President Reagan may have been referring to this portion of the Report of the House Committee on the Judiciary when he stated that only intentional discrimination will give rise to a section 1324b cause of action. If this interpretation is correct, a person may argue that the Report of the House Committee on the Judiciary erroneously concluded that the word "intentional" was relevant to any 1986 Act "pattern or practice" situation other than section 1324a(f), which deals with criminal violations. Such an analysis may be warranted since each of the cases cited by the Committee as examples of pattern or practice decisional law involving other statutes consisted of a civil rights matter. The holdings of these cases remain consistent with the title VII cause of action and burden of proof discussion outlined above.

At first glance, the Attorney General's Proposed Regulations seem to follow strictly President Reagan's interpretation of the standard of proof necessary to make out a violation of the 1986 Act. In the "Supplementary Information" Section II to the Proposed Regulations, the Attorney General relies, in part, upon the portion of the Report of the House Committee on the Judiciary to find that "unintentional discrimination merely on the basis of [its] disparate impact" was not unlawful. The Attorney General added, See supra note 89 and accompanying text. 

90. See Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Court stated that "good intent or absence of discriminatory intent does not redeem employment procedures... that operate as 'built-in headwinds'.... Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." Id. at 432 (emphasis in original).
93. Id. (citing International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); United States v. International Ass'n of Iron Workers Local 1, 438 F.2d 679 (7th Cir. 1971); United States v. Mayton, 335 F.2d 153 (5th Cir. 1964)).
94. Id. (emphasis added).
95. Id.
96. See id.
97. See supra note 89 and accompanying text.
98. See Proposed Regulations, supra note 18, Supp. Information II.
99. Id.
however, that broad circumstantial evidence and statistics may effectively prove discriminatory intent. Given this rather broad explanation to his Proposed Regulation, the Attorney General may be indicating his view that the burden of proof required to make out a pattern or practice case of intentional discrimination is not so overwhelming as to discourage potential claimants. Much litigation may be necessary before this issue is settled.

Other parts of section 1324b(d)(2) also deserve analysis. For example, this portion of the 1986 Act allows individuals to file complaints directly with ALJs. This procedure will appear completely foreign to most, if not all, ALJs in the federal government and is likely to cause considerable confusion. Also, while an individual must wait a minimum of 120 days from the filing of the charge before instituting a complaint before an ALJ, there is no outer limit on how long an individual may delay filing after the 120-day period has run. In this regard, section 1324b appears unlike title VII, in that the latter statute requires an aggrieved person to file a complaint in a United States district court within 90 days of receipt of a right-to-sue notice from the EEOC, or else the person may have waived his or her right to initiate litigation.

In his Proposed Regulations, however, the Attorney General attempts to create a limitations period. The Proposed Regulations require a filed complaint with an ALJ within 90 days after the Special Counsel’s 120-day period. One must wait to see whether the courts will allow the Attorney General, by regulation, to determine so critical a matter as a limitations period, when Congress did not see fit to do so itself. Moreover, since the Special Counsel will in many cases be unable to complete his investigation and issue his determination in the post-charge filing 120-day period, the limitations period appears both harsh and a violation of the public policy favoring settlement and conciliation.

J. Section 1324b(d)(3): “Time Limitations on Complaints”

Pursuant to section 1324b(d)(3), a party may not file a complaint with an

100. Id.
102. See id.
104. Proposed Regulations, supra note 18, § 44.303(c).
105. Id. This provision specifically states that a charging party “may bring his or her complaint directly before an administrative law judge within 90 days of the end of the 120-day period [that the Special Counsel has to investigate and make a determination on a charge].” Id.
ALJ in cases in which the complaining party has waited in excess of 180 days from the alleged discriminatory event before submitting the charge to the Special Counsel. The question will no doubt often arise as to whether this 180-day charge filing requirement is jurisdictional, in the sense that failure to comply will absolutely extinguish the subject matter jurisdiction of the ALJ. In coming to grips with this issue, the ALJs and reviewing courts might rely again upon established title VII decisional case law. Under title VII, for instance, the Supreme Court has held that a person who fails to file his charge of discrimination within 180 days from the event becomes estopped from maintaining a cause of action. This standard is an elastic one, however, which is subject to equitable extension.

Finally, the 1986 Act apparently only makes employer discrimination in hiring and firing unlawful. These actions constitute concrete, nonrecurring events. The finality of these events means that under this statute a claim that alleged late filings may be excused because they involve continuing violations appears unlikely. In this respect, title VII law may not apply to section 1324b.

K. Section 1324b(e)(1): “Hearings—Notice”

The Frank Amendment, at section 1324b(e)(1), provides that ALJs are to serve upon the respondent-defendant employer a copy of the complaint that either the Special Counsel or the individual claimant filed. At the same time, the ALJ must issue and serve upon the parties a notice of hearing. The complaining party may amend its complaint at any time, with the judge’s consent, prior to the issuance of the ALJ’s decision and order. Section 1324b(e)(1) grants to a respondent the right to file an answer and to appear and defend itself at the hearing. The judge can conduct no hearing until at least five days have elapsed from the date of service of the complaint.

As any employment law practitioner will attest, preparation for the defense of even a relatively straightforward discrimination case involving the termination of a single individual may take a great deal of time and effort. The statute prescribes short time periods in which to work. The 1986 Act may also further hamper necessary preparation since it allows for class action types of litigation in pattern or practice situations, which include the most difficult and complex of litigation activities. Although no section 1324b hearing may begin less than five days from respondent’s receipt of the

107. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). The United States Supreme Court found that an untimely filing of a charge with the EEOC does not raise a jurisdictional defect, but rather results in treatment similar to that under a statute of limitations, and stands subject to waiver, estoppel, and equitable tolling. Id.
109. Id.
110. Id.
111. Id.
112. Id.
113. Id.
complaint, a practitioner must hope that ALJs will recognize such practical considerations when scheduling hearings.

L. Section 1324b(e)(2): “Judges Hearings Cases”

Section 1324b(e)(2) of the 1986 Act requires that the Attorney General specially designate ALJs to hear unfair immigration-related employment practice cases and that these ALJs must possess “special training respecting employment discrimination.” Moreover, as much as possible, these designated ALJs should consider only cases arising from section 1324b. In practical terms, this provision may represent one of the most important of all the provisions contained in the Frank Amendment. As discussed in greater detail below, these ALJs will be exercising an authority unique in the employment law field, inasmuch as no board or agency panel will review their decisions. Instead, a party may appeal ALJ decisions directly to the United States courts of appeals. These ALJ decisions will become fundamentally important in that they will determine the effectiveness of the 1986 Act as an expression of national policy. The fairness and regularity of the proceedings that the ALJs conduct, and the accuracy and evenhandedness of the witness-credibility resolutions they make, will determine not only whether justice prevails in a particular case, but more importantly whether the public attaches confidence to this statutory process.

The above-mentioned considerations may have caused Congress, in section 1324b(e)(2), to specify that ALJs constitute the finders of fact in section 1324b proceedings and that the Attorney General designate only ALJs with employment discrimination experience and training. Both of these qualifiers appear to eliminate immigration judges of the INS from consideration. First, these judges are not ALJs, and second, they likely do not possess the requisite employment discrimination training, since heretofore this country’s immigration laws did not treat that subject.

Many agencies and departments of the federal government employ cadres of ALJs, and several governmental bodies handle employment discrimination matters. In the latter category, one such organization is the EEOC, which, however, has no ALJs. Another such agency is the NLRB, which, in comparison, has more than 100 ALJs who deal extensively with employment discrimination cases. Apparently, the NLRB possesses the most likely pool from which the Attorney General may designate ALJs who meet the statutorily required experience factor.

M. Section 1324b(e)(3): “Complainant as Party”

Section 1324b(e)(3) allows an ALJ to consider the complainant as a full party in any proceeding that concerns his or her charge held before such

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114. Id. § 1324b(e)(2).
115. Id.
116. See infra note 173 and accompanying text.
This section also gives ALJs the discretion to allow other interested persons to intervene. By allowing a complainant all the rights of a litigation party in cases where the complainant institutes the action, the Frank Amendment grants alleged discrimination victims the same rights that Title VII claimants who file in a United States district court possess.

Section 1324b(e)(3) also would apparently apply, however, even when the Special Counsel has brought the complaint. In such a case the complainant may still act as a full litigation party. If this result is the effect of section 1324b(e)(3), then the Frank Amendment gives alleged victims of employment discrimination substantially more rights than they would enjoy under other statutes. For example, under the enforcement scheme of the NLRA, only the NLRB's General Counsel can bring or prosecute complaints. The NLRA does not provide for a private right of action for victims of unfair labor practices. Also, although the charging party in a hearing before an ALJ of the NLRB may procedurally be a party for the purpose of service of pleadings or briefs, clearly the NLRB's General Counsel possesses sole prosecutorial responsibility. The NLRA charging party may participate, but does not play the lead litigation role. Under section 1324b(e)(3) of the 1986 Act it is not clear how vital a litigation party the complainant may be when the Special Counsel brings the complaint. The Special Counsel may need to draft litigation procedures carefully in order to avoid confusion and conflicting trial tactics.

N. Sections 1324b(f)(1) and (2): “Testimony and Authority of Hearing Officers—Testimony—Authority of Administrative Law Judges”

Sections 1324b(f)(1) and (2) state that: (1) transcripts are to be made of proceedings before ALJs; (2) the Special Counsel and the relevant ALJ shall possess the ability to examine the evidence, within reason, of those being investigated; (3) the ALJs may require the appearance of witnesses and the production of evidence by subpoena; and (4) subpoena enforcement is to be in a United States district court. These subsections, therefore, involve both the investigation of charges and the conduct of hearings on complaints. Pursuant to the Attorney General's Proposed Regulations, the Special Counsel possesses charge-investigation powers in order to obtain from respondents evidence that they may not wish to relinquish voluntarily. Furthermore, the ALJ may issue subpoenas, both ad testificandum and duces tecum, for use in litigation.
Interestingly, the 1986 Act gives little guidance regarding how ALJs should conduct these hearings other than specifying that a transcript is to be made. In his Proposed Regulations, however, the Attorney General stated that "the hearing and promulgation of [an] order shall be conducted in conformity with 5 U.S.C. [§§] 554-557 (sections 5-8 of the Administrative Procedures Act) ..." Yet, whether the parties will be allowed any pre-hearing discovery rights is presently unclear. Whether pre-hearing motions for summary judgment or motions in limine will be in order also remain as undecided issues. Furthermore, the Attorney General clearly intends that the Federal Rules of Evidence not apply.

In addition, since the Frank Amendment is patterned, in part, upon the enforcement scheme of the NLRA, and since the NLRB-employed ALJs, like those to be designated under the 1986 Act, follow the Administrative Procedures Act, a brief examination of several established rules involving the conduct of unfair labor practice proceedings under the NLRA could prove useful:

(1) the NLRB has never allowed such pre-trial discovery as written interrogatories, requests for admissions, requests for production of documents, and the like in unfair labor practice litigation, and depositions are very seldom taken;

(2) pre-trial depositions are only allowed upon a showing of good cause, such as the unavailability of a witness due to illness or distance from the hearing;

(3) the Federal Rules of Evidence apply to NLRA hearings only when practicable, and ALJs of the NLRB are given wide discretion in this regard;

(4) prior to an unfair labor practice hearing the parties do not exchange witnesses and document lists; and

(5) the closest approximation to discovery that a party will receive in a case before an ALJ of the NLRB is that, upon demand following the direct examination of a witness by the NLRB's General Counsel, the NLRB must turn over to an opposing party's counsel for purposes of cross examination and credibility impeachment pre-trial statements made to NLRB investigators.

Assuming, for the sake of argument, that ALJ proceedings

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130. Proposed Regulations, supra note 18, § 44.306(f).
131. See id. § 44.306(g). The Attorney General's proposed rules state that "technical rules of evidence shall not apply to hearings conducted pursuant to this paragraph." Id.
135. See Carpenter Sprinkler Corp. v. NLRB, 605 F.2d 60, 66 (2d Cir. 1979) (Board not required to abide automatically by rules of evidence governing trials); NLRB v. Process & Pollution Control Co., 588 F.2d 786, 791 (10th Cir. 1978) (rules of evidence not rigidly imposed on Board).
136. See Ra-Rich Mfg. Corp., 121 N.L.R.B. 700, 704 (1958); see also Jencks v. United States, 353 U.S. 657, 668-69 (1957) (defendant entitled to inspect agent's reports to further his
under section 1324b of the 1986 Act follow the pattern described above, numerous issues appear to need resolution in the near future, including:

(1) Given the fact that pattern or practice allegations raise class action kinds of issues, and considering that class actions in the federal court system have proven to be among the most complex of litigation matters, how will Frank Amendment ALJs handle these cases without allowing the parties some minimal discovery?

(2) Although the Supreme Court's decision in Jencks v United States\(^{137}\) apparently requires the Special Counsel to turn over witness statements after direct testimony, \textit{Jencks} only makes the government produce witness statements. Since the Frank Amendment allows the charging party to file a complaint on his or her own behalf, can the ALJ require production of witness statements under those circumstances?

(3) To what extent will parties be allowed access to materials in the files of the Special Counsel, pursuant to the Freedom of Information Act?\(^{138}\)

(4) To what extent will the Privacy Act of 1974\(^{139}\) be adhered to by the Special Counsel?

(5) Since charging parties appear to have an unfettered right to file a complaint with the ALJ, if the Special Counsel does not act after 120 days from the date the charge is received, will any means be developed for screening frivolous claims?\(^{140}\)

\textbf{O. Sections 1324b(g)(1) and (2)(A): "Determinations—Order—Orders Finding Violations—In General"}

Subsections 1324b(g) through (j) of the 1986 Act confer powers upon Frank Amendment ALJs that appear greater than those possessed by any other corps of ALJs in the federal service.\(^{141}\) Beginning with section 1324b(g)(1) and (2)(A), ALJ decisions are given final order status, unless a party appeals under section 1324b(i).\(^{142}\) Using a preponderance of the evidence standard, if the ALJ determines that an unfair immigration-related employment practice has taken place, that judge must state his or her findings and conclusions in writing, and must serve such findings on the relevant parties, along with a cease and desist order.\(^{143}\)

Authority to issue such cease and desist orders creates a power that sets 1986 Act ALJs apart from their brethren at other agencies and departments. For example, under the NLRA, a recommended order, which is appealable defense); 18 U.S.C. § 3500 (1982) (after a government witness has testified on direct cross-examination, court may order government to provide any relevant statements of witness to defendant).

\(^{137}\) 353 U.S. 657 (1957).
\(^{139}\) Id. § 552a.
\(^{140}\) Some provisions for pre-hearing summary judgment motions may be necessary if the system is to avoid being bogged down with insubstantial cases.
\(^{142}\) Id.
\(^{143}\) Id. § 1324b(g)(2)(A).
to the NLRB itself, embodies an ALJ’s decision.\textsuperscript{144} Under the NLRA, only the NLRB possesses the authority to issue a cease and desist order, and the NLRB cannot enforce these orders since they depend upon application to the United States courts of appeals for enforcement.\textsuperscript{145} Since the Frank Amendment does not provide for any kind of board to review decisions of its ALJs, such ALJs stand in a position similar to that of United States district court judges, whose decisions are also reviewed directly by the courts of appeals.

\textbf{P. Section 1324b(g)(2)(B): “Contents of Order”}

Section 1324b(g)(2)(B) gives a Frank Amendment ALJ the authority to: (1) order a respondent employer to hire or to re-employ the discriminatee(s); (2) order the payment of back wages to victims of unlawful discrimination; and (3) assess a penalty of $1,000 per discriminatee, or $2,000 per discriminatee if the employer has previously been found guilty of an unfair immigration-related employment practice.\textsuperscript{146} The ALJ may also order the payment of attorneys’ fees to the prevailing party.\textsuperscript{147} Taken together, these remedies give Frank Amendment ALJs considerable authority. This discretion requires that the Attorney General carefully select these ALJs. Indeed, such remedy options approach those of United States district court judges in title VII cases and certainly exceed those granted to ALJs of the NLRB. While NLRB ALJs, like Frank Amendment ALJs, may determine back pay and reinstatement issues, such ALJs lack authority to order the payment of attorneys’ fees, and they may not levy civil monetary penalties.\textsuperscript{148} ALJs of the NLRB are also bound by existing NLRB precedent, regardless of whether the individual ALJ agrees with the historical NLRB rulings on a particular issue.\textsuperscript{149} Since Frank Amendment ALJs have no reviewing administrative body, the only check upon their findings of fact and conclusions of law will be the courts of appeals, or ultimately the Supreme Court. Indeed, because the various courts of appeals often differ with respect to statutory interpretation and other significant legal principles, and since section 1324b ALJs will be hearing cases in the geographical territories of all courts of appeals, parties may reasonably assume that these ALJs will not feel absolutely bound by the precedent of any court, other than the Supreme Court itself. In consideration of these possibilities, and in recognition of the fact that years may pass before courts and ALJs hand down definitive rulings regarding the many questions raised by the 1986 Act, the Frank Amendment ALJ’s initial power may fairly be characterized as awesome.

\textsuperscript{144} See 29 U.S.C. § 160(c) (1982).
\textsuperscript{146} 8 U.S.C.S. § 1324b(g)(2)(B) (Law. Co-op. 1987). Subsections 1324b(g)(2)(B)(i) and (ii) give the ALJ the authority to order a respondent to comply with the requirements of the 1986 Act’s § 1324a(b), which involves hiring verifications, for a three-year period, and also to retain, for this same time period, the names and addresses of all applicants for employment. \textit{Id.}
\textsuperscript{147} \textit{Id.} § 1324b(h).
\textsuperscript{148} See 29 U.S.C. § 160(c) (1982).
\textsuperscript{149} See Consolidated Casinos Corp., 266 N.L.R.B. 988 (1983).
Q. Section 1324b(g)(2)(C): “Limitations on Back Pay Remedy”

Section 1324b(g)(2)(C) states that an ALJ may not order back pay to accrue “from a date more than two years prior to the date of the filing of a charge with an administrative law judge.”\(^{150}\) This emphasized portion appears important because it reduces the potential back pay that a complainant may receive under the 1986 Act, as compared to what the claimant might receive if he or she maintained the case under title VII. Under title VII, back pay liability may not accrue from a date more than two years prior to the filing of the relevant charge with the EEOC.\(^{151}\) The result is that the back pay “meter” continues to run for a title VII complainant for the entire period that the EEOC administratively processes the charge; the longer it takes to resolve such a title VII claim, the more back pay may ultimately be awarded. Under section 1324b(g)(2)(C), however, an ALJ will measure back pay from the date a complaint is filed with the ALJ, as opposed to the Special Counsel.\(^{152}\) A 1986 Act complainant thus loses back pay time for the investigation period. This factor should provide some incentive for 1986 Act complainants to file their charges with ALJs within a reasonable time after the right to file matures.

Section 1324b(g)(2)(C) includes additional provisions. The most important of these provisions reduces the amount of back pay by interim earnings.\(^{153}\) In this respect, the Frank Amendment appears consistent with the remedy schemes of both title VII and the NLRA.\(^{154}\) The importance of this back pay issue makes it useful to set forth a few principles that have developed under these employment discrimination statutes. These principles include:

1. courts normally consider unemployment compensation benefits as collateral earnings and, as such, not deductible from back pay;\(^{155}\)
2. back pay awards reflect the discriminatee’s total earnings, including remuneration for overtime, sick pay, medical expenses that insurance carried by the employer would have covered, vacation pay, pension and profit sharing contributions, etc.;\(^{156}\)

\(^{153}\) Id.
\(^{155}\) See NLRB v. Gullett Gin Co., 340 U.S. 361, 363-64 (1951) (Board did not exceed power in refusing to deduct from back pay sums paid to employees as unemployment compensation); EEOC v. Ford Motor Co., 645 F.2d 183, 195 (4th Cir. 1981) (district court correct in not requiring back pay to be reduced by amount of unemployment compensation), rev’d on other grounds, 458 U.S. 219 (1982); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977) (district court properly used discretion in not deducting unemployment compensation from back wages).
\(^{156}\) See, e.g., Sinclair v. Automobile Club, 773 F.2d 726, 729 (10th Cir. 1984) (wage rate used to assess back pay included those wages calculated on an incentive); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 263 (5th Cir. 1974) (back pay defined to include interest, overtime, shift differentials, vacation, and sick pay), cert. denied, 439 U.S. 1115 (1979), cert. denied, 467 U.S. 1243, cert. dismissed, 467 U.S. 1247 (1984); EEOC v. St. Joseph Paper Co., 557 F. Supp. 435, 442 (W.D. Tenn. 1983) (contributions required of employer in order to restore employee in pension plan); Prestige Bedding Co., 212 N.L.R.B. 690, 691 (1974) (em-
(3) While the complainant possesses an affirmative duty to seek out other employment, and thereby to mitigate his damages, the employer usually possesses the difficult burden of proving what the complainant could have earned had he or she used proper diligence in satisfying this duty;\textsuperscript{157} and

(4) Courts exclude periods during which the complainant has been removed from the job market in determining the back pay that is due. These periods encompass absences due to such events as illness and returning to school, among others.\textsuperscript{158}

\textbf{R. Section 1324b(g)(2)(D): "Treatment of Distinct Entities"}

Section 1324b(g)(2)(D) of the Frank Amendment\textsuperscript{159} contains language identical to that found in the last paragraph of section 1324a(e)(4), which covers sanctions.\textsuperscript{160} Both of these provisions define “distinct entities” for purposes of the progressive application of monetary penalties. Under section 1324b the civil penalty that an ALJ may assess increases from $1,000 to $2,000 per violation, if a previous ALJ has found that the respondent earlier committed an unfair immigration-related employment practice.\textsuperscript{161} The intent of section 1324b(g)(2)(D), therefore, is to define the relevant employing subdivision or entity for purposes of determining whether a previous offense has been committed. The statute attempts to protect a large entity from its subdivisions’ transgressions.\textsuperscript{162} Since each subdivision’s violations do not

\textsuperscript{157} See Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th Cir. 1978) (burden of proving failure to mitigate on employer); NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 575 (5th Cir. 1966) (failure to reasonably seek interim work an affirmative defense to back pay liability, and employer carries burden of proof).


\textsuperscript{160} Id. § 1324a(e)(4).\textsuperscript{161} Id. § 1324b(g)(2)(B).

\textsuperscript{162} A Congressional committee specifically discussed this confusing concept of “distinct entities” when determining the process for counting violations. The committee stated that:

The legislation also provides 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. Moreover, in the case of a corporation or other entity composed of distinct, physically separate subdivisions which do their own hiring and recruiting for employment (with reference to the practices of, or under the control of, or common control with another subdivision) such subdivision shall be considered a separate person or entity. Under this provision a parent corporation, such as a large automaker, which has several subdivisions that hire independently of each other would be held jointly responsible whenever one of its subdivisions violates the provisions of this Section.

For example, suppose automaker A has two distinct subdivisions, X and Y. In 1984, subdivision X commits its second violation, i.e., it becomes liable under the first civil fine provision. At that point, automaker A is jointly responsible with X for such liability. In 1985, subdivision Y commits its first violation. 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
count toward the parent's progressive accumulation of penalties under either the Frank Amendment or that portion of the 1986 Act that deals with sanctions, this provision may provide some incentive for employers to decentralize their human resource functions.

S. Section 1324b(g)(3): “Orders Not Finding Violations”

Like most statutes that provide remedies for employment discrimination, the 1986 Act states that if the ALJ finds no violation he or she must issue an order of dismissal.163 The judge must also state his or her findings of fact.164 This portion of the Frank Amendment appears self-explanatory.

T. Section 1324b(h): “Awarding of Attorneys’ Fees”

In a marked departure from the levels of authority granted to ALJs of other federal agencies dealing with employment discrimination, section 1324b(h) allows the award of attorneys' fees to the prevailing party, but not to the Special Counsel.165 Such fees are allowed, however, only if the loser's argument possesses no reasonable grounds in law and fact.166 In the employment discrimination field, heretofore only United States district court judges operating under title VII have had the authority to award attorneys’ fees.167 Once again a parallel situation exists between these two remedial statutes, and one should compare the two.

The factors used by the courts in computing appropriate attorneys' fees in a title VII case include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee for similar work in the community; (6) whether the fee arrangement with the client was fixed or contingent; (7) the time limitations imposed upon the attorney by the client or the circumstances; (8) the amount of damages involved and the results obtained; (9) the experience, reputation, and ability of the successful attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) the size of fee awards granted by the district court in similar cases.168 Moreover, since, title VII, like section

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.

It must be emphasized that this limitation applies only to those situations where the subdivisions of the corporation or entity do their own hiring and recruiting for employment completely independent and irrespective of the other subdivisions.

H.R. REP. NO. 682, supra note 92, at 60 (emphasis added).


164. Id.

165. Id. § 1324b(h).

166. Id.


168. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974); see
1324b(h) of the Frank Amendment, allows fee awards to the prevailing party, one must note that the Supreme Court, in Christiansburg Garment Co. v. EEOC,\(^1\) found that successful defendants may obtain attorneys' fees if the court found the plaintiff's suit "frivolous, unreasonable or without foundation,"\(^2\) even if not initially brought in bad faith.\(^3\)

Unlike title VII, section 1324b(h) of the 1986 Act contains an attorneys' fee qualifier. For instance, judges are to award fees only when the losing party's argument had no reasonable basis.\(^4\) The likelihood of attorneys' fees being awarded pursuant to the Frank Amendment, therefore, appears to lie between title VII's almost automatic award of fees when plaintiffs prevail and the Christiansburg Garment "frivolous, unreasonable, or without foundation" standard when defendants succeed in litigation. On balance, and considering the remedial intent behind the Frank Amendment, parties may anticipate that ALJs will generously decide the issue of whether they award prevailing complainants attorneys' fees.

U. Sections 1324b(i)(1) and (2): "Review of Final Orders—In General—Further Review"

Under the Frank Amendment, the aggrieved individual may appeal ALJ orders to the United States court of appeals for the circuit where the violation took place, where the employer resides, or where the employer transacts business.\(^5\) Appeals must be taken within sixty days of the ALJ's final order.\(^6\) In this respect, the Frank Amendment borrows from the NLRA, insofar as that statute details how appeals are to be taken from orders of the NLRB itself.\(^7\) Consequently, discussed below are a few NLRA principles that have developed with regard to court review.

Under the Supreme Court's decision in Universal Camera v. NLRB\(^8\) an appellate court will affirm an agency decision if substantial evidence on the record as a whole supports the decision.\(^9\) Demonstrating that the standard of judicial review is relatively narrow, however, the Court in Universal Camera elaborated that an appellate court cannot set aside an NLRB decision when the choices are conflicting and the reviewing court would have made a

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170. Id. at 422.

171. Id.; see Beard v. Annis, 730 F.2d 741, 745 (11th Cir. 1984) (within district court's discretion to award attorney's fees to prevailing defendant if plaintiff's suit frivolous, unreasonable, or without foundation, even if bad faith not proven).


173. Id. § 1324b(h)(1).

174. Id.


177. Id. at 488. A reviewing court may set aside an NLRB decision only "when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." Id.
different decision by itself.\textsuperscript{178} In practice, courts of appeals have generally upheld NLRB factual determinations.\textsuperscript{179} With respect to questions of law, the courts have been somewhat less hesitant to intervene,\textsuperscript{180} although they generally tend to grant deference to that agency's expertise in its area of specialty.\textsuperscript{181}

Accordingly, one may assume that, in reviewing decisions of Frank Amendment ALJs, the courts of appeals will be reluctant to substitute their judgment for the factual findings of the ALJs, if substantial evidence in the record supports such findings. Moreover, since the ALJs will have the opportunity to observe the demeanor of witnesses, the appellate courts, as reviewing bodies, may accept the ALJs' credibility resolutions and will not overturn such resolutions unless a clear preponderance of all the relevant evidence demonstrates that the ALJs' determinations were incorrect.\textsuperscript{182} These considerations serve to underscore the critical role that section 1324b ALJs will play with regard to the equitable administration of the 1986 Act.

\section*{V. Sections 1324b(j)(1)-(4): \textit{"Court Enforcement of Administrative Orders—In General—Court Enforcement Order—Enforcement Decree in Original Review—Awarding of Attorneys' Fees"}}

ALJ orders are not self-enforcing under the Frank Amendment. Section 1324b(j) provides that if neither party takes an appeal to the applicable United States court of appeals, either the Special Counsel or the complainant may make enforcement application to the appropriate United States district court.\textsuperscript{183} There exists no trial de novo in such a proceeding, however, inasmuch as the ALJ's decision will not be reviewed.\textsuperscript{184} Apparently district court enforcement of an ALJ decision that neither party appealed will be automatic. Finally, section 1324b(j) provides for the award of attorneys' fees in connection with proceedings involving both court of appeal review and district court enforcement.\textsuperscript{185}

\section*{W. Sections 1324b(k)(1) and (2): \textit{"Termination Date"}}

The Frank Amendment contains a "sunset" provision that allows the

\begin{thebibliography}{99}
\bibitem{178} \textit{Id.}
\bibitem{179} \textit{See, e.g., Jim Causley Pontiac v. NLRB, 620 F.2d 122, 126 (6th Cir. 1980) (substantial evidence supported finding); NLRB v. Tischler, 615 F.2d 509, 511 (9th Cir. 1980) (court upheld findings of Board); Newport News Shipbldg. & Dry Dock Co. v. NLRB, 602 F.2d 73, 78 (4th Cir. 1979) (evidence supported Board's factual determination of proximate cause of strike).}
\bibitem{180} \textit{Compare NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951) (Court respected Board's legal findings) with Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 914 (3d Cir. 1981) (courts grant less deference to Board's findings if the issue is a legal rather than a factual one).}
\bibitem{181} \textit{See NLRB v. Hearst Publications, 322 U.S. 111, 130 (1944) (agency proper entity to define employee and carry out other tasks primarily assigned to it).}
\bibitem{182} \textit{See Standard Dry Wall Prods., Inc., 91 N.L.R.B. 544, 545 (1950) (trial examiner's credibility findings overruled only on clear preponderance of all relevant evidence).}
\bibitem{183} \$ U.S.C.S. § 1324b(j) (Law. Co-op. 1987).
\bibitem{184} \textit{Id.}
\bibitem{185} \textit{Id.}
\end{thebibliography}
1986 Act's anti-discrimination measures to terminate if either of two conditions are met. First, section 1324b(k)(1) states that the amendment will expire if Congress repeals the employer sanctions portion of section 1324a. Second, the amendment will no longer apply to employment matters if: (1) the Comptroller General finds that employer sanctions have not resulted in significant discrimination against eligible workers, or (2) the Comptroller General finds such sanctions have created an unreasonable burden on employers, and (3) the Congress approves such Comptroller General report. Considering the strong feelings expressed throughout the legislative history of the 1986 Act regarding the need for sanctions and anti-discriminatory measures, the "sun" may never "set" on the Frank Amendment.

III. CONCLUSION

The Frank Amendment to the 1986 Act may prove to be one of the most prolific sources of employment law litigation since the enactment of title VII, at least in those states with a high percentage of aliens, both legal and illegal. Procedurally, the Frank Amendment consists of a hybrid of several federal laws that Congress designed to combat employment discrimination, most notably title VII and the NLRA. Consequently, much of the case law that the Frank Amendment will generate likewise will be borrowed from analogous federal statutes. Much within the amendment is unique, however, particularly the sweeping powers given the ALJs that the Attorney General will specially designate. This select band of men and women will constitute the pioneers in this unfolding chapter in the ever-evolving world of employment discrimination law.

186. Id. § 1324b(k).
187. Id.
188. Id.