



# Special Delivery: Unwelcome Outreach From The Government

**Part 2: Immigration Discrimination  
- Department of Justice: Return to Sender Please!**

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**Seyfarth Shaw LLP**

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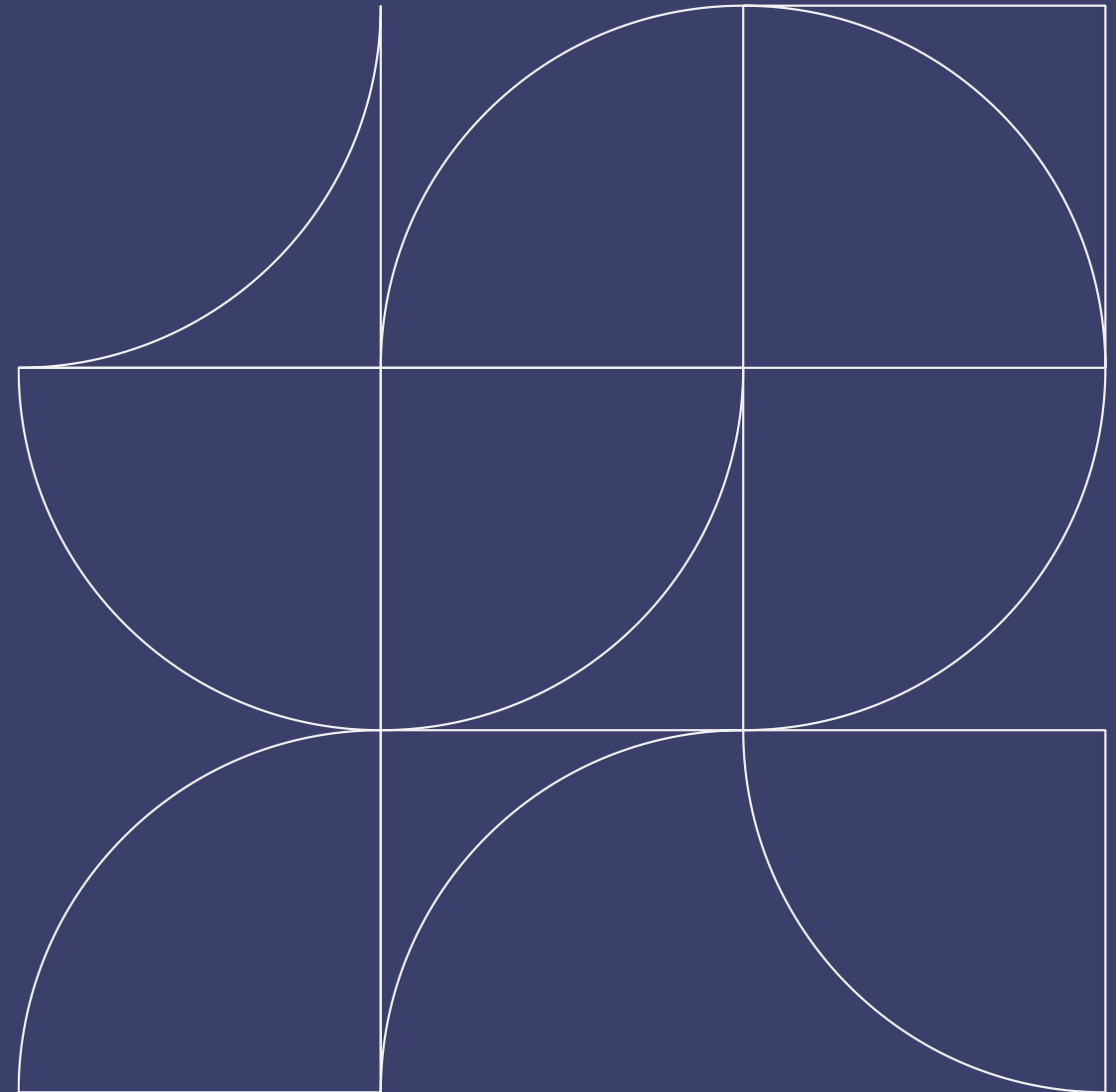
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# Agenda

- 01** | Immigrant and Employee Rights Section (“IER”): The Law They Enforce
- 02** | IER’s Enforcement and Compliance Tools
- 03** | Common Discrimination Complaints Received by IER
- 04** | Recent IER Settlements

# What is IER and The Law They Enforce?



# IER: Overview

- Immigrant and Employee Rights Section
- Part of the US Department of Justice, Civil Rights Division
- Chief is a political appointee, unlike other section chiefs in DOJ
- Staffed with attorneys, paralegals and analysts who enforce a single anti-discrimination section of the Immigration Reform and Control Act – 8 U.S.C. § 1324b



THE UNITED STATES  
DEPARTMENT *of* JUSTICE

# The Law IER Enforces: 8 U.S.C. § 1324b

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- **Citizenship status discrimination** involving hiring, firing, and recruitment or referral for a fee by employers with four or more employees
  - Citizenship status includes a person's immigration status.
  - “Protected individuals”: U.S. citizens, U.S. nationals, asylees, refugees, and *recent* lawful permanent residents (aka green card holders)
  - Exceptions:
    - Lawful permanent residents who do not apply for naturalization within six months of eligibility are not protected
    - Employer may restrict hiring to a U.S. citizen only if a law, regulation, executive order, or government contract requires the employer to do so



***“Discriminate” in 8 U.S.C. 1324b(a) “means the act of intentionally treating an individual differently from other individuals because of national origin or citizenship status, regardless of the explanation for the differential treatment, and regardless of whether such treatment is because of animus or hostility.”***



# The Law IER Enforces: 8 U.S.C. § 1324b

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- **Unfair documentary practices** related to verifying the employment eligibility of employees
  - Requesting more documents than minimally required to comply with Form I-9
  - Specifying particular identity or employment authorization documents, i.e., depriving the employee of the choice of which documents to present from the LOAD (Lists of Acceptable Documents)
  - 1996 Amendment – no disparate impact theory of discrimination allowed
    - Only intentional discrimination, i.e., disparate treatment basis, is allowed
  - Liability for unfair documentary practices can only arise if the employer's request for more documents or refusal to honor tendered documents is "made for the purpose or with the intent of discriminating against an individual" on the basis of national origin or citizenship status

# The Law IER Enforces: 8 U.S.C. § 1324b

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- **Retaliation/Intimidation**

- Employers of any size are not allowed to intimidate, threaten, coerce, or retaliate against individuals for:

- filing charges with IER;
- cooperating with an IER investigation;
- opposing action that may constitute unfair documentary practices or discrimination based upon citizenship status, or national origin; or
- otherwise asserting their rights under the IRCA's anti-discrimination provision

# Types of Discrimination Charges

## National Origin

- Charlie is discriminated against during the hiring process because Charlie disclosed he is from the country of Utopia. Mary found that out after asking where he was from, noting that Charlie speaks with a very heavy accent. Mary does not want to hire anyone from a country like Utopia with alleged terrorist ties.

## Citizenship Status

- Sree was discriminated against during the onboarding process because of his immigration status. Sree presented his LPR card during the I-9 process but was asked for different documents. Furthermore

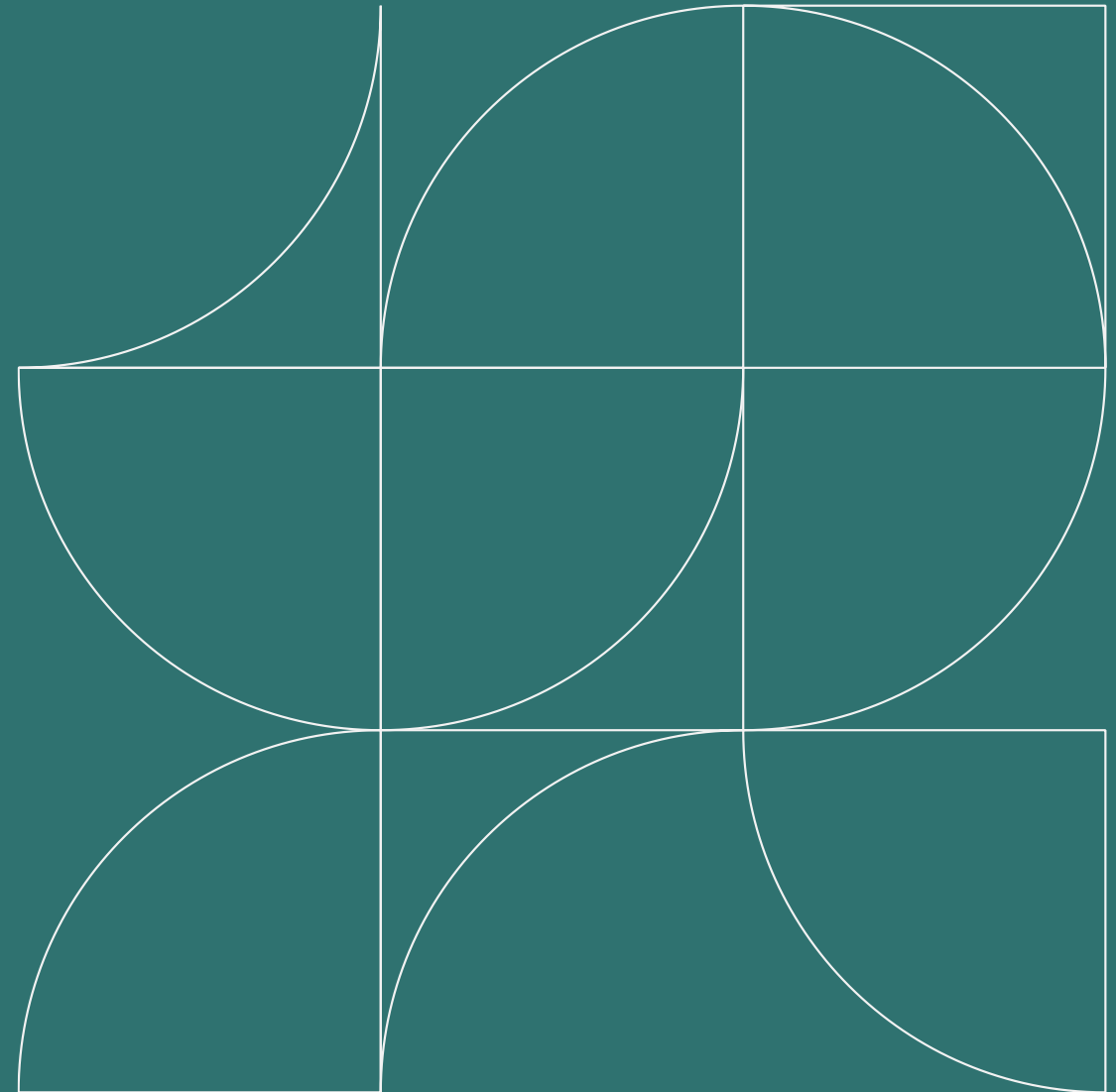
## Retaliation

- Riva was retaliated against after Riva asked for help in addressing her concerns about a team related immigration-related employment practice. After contacting the IER hotline about a concern over a reverification request, Riva's employer suspended her.

## Unfair Doc Practice

- ABC Co. refused to accept a SS Card from Tomas, but instead requested a new Employment Authorization Card (EAD) card during a reverification after Tomas' original EAD card expired.
- Hannah, the HR, "just wanted to make sure" that Tomas is actually work authorized.

# IER Enforcement Mechanisms



## **Tools in the IER Toolbox -- Interventions**

- The IER Hotline
  - The Hotlines:
    - Worker Hotline: 1-800-255-7699
    - Employer Hotline: 1-800-255-8155
  - Employees and employers work directly with IER's staff
    - Resolve potential immigration-related employment disputes informally
  - Avoiding litigation and investigation
- More on Interventions
  - What cases get resolved through the hotline?
  - What should the employer do if contacted about a hotline complaint?

- TALs, Training, Outreach
- Technical Assistance Letters
  - [Technical Assistance Letters \(justice.gov\)](https://www.justice.gov/technical-assistance-letters)
  - Respond to public requests for technical assistance often by employers and/or attorneys
  - Organized according to topics
- Other Outreach
  - Settlements and Press Releases posted
  - Technical Assistance and Training Materials
  - IER publications
  - Webinars and educational programs
  - [Worker Information \(justice.gov\)](https://www.justice.gov/worker-information)
  - Topics include E-Verify, Asylee/Refugees, TPS, SS No-Match and more

## Other Compliance Tools

# Other Compliance Tools –

- Interagency Partnerships
- E-Verify Data Mining
- IER review of other agencies' policies
- IER Charge Referral Checklist

REFERRAL CRITERIA	NO	YES
Did the alleged discrimination occur in connection with ANY of the following? <input type="checkbox"/> Hiring, firing (incl. constructive discharge) or recruitment/referral; OR <input type="checkbox"/> Actions to verify or investigate an individual's work authorization (e.g., Form I-9, E-Verify, background check, etc.), including the presentation or rejection of documents to prove work authorization	○	○
Were the alleged discriminatory actions potentially taken on the basis of the Charging Party's citizenship/immigration status or national origin, or in retaliation against the Charging Party?	○	○
Did the employer or recruiter/referrer for a fee employ 4 or more employees on the date of the alleged discrimination? <sup>1</sup>	○	○
Did the charge indicate that the discrimination either occurred within 180 days of the filing of the charge or is it potentially continuing?	○	○

# Complaint Investigations - - Initiation of Charges

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- Charge vs. Independent Investigation
  - Who can file a charge?
    - Anyone who alleges they are a victim of discrimination or retaliation, or an authorized person on behalf of the victim
    - Within 180 days of the alleged discriminatory act
  - IER may, on its own, conduct an independent investigation
    - Data requests (backed by subpoena power)
    - Based on information from a variety of sources, including charge referrals from other government agencies, or information from United States Attorney's Offices
    - typically involve discriminatory policies, practices, or processes that potentially affect many employees or applicants

# Anatomy of an IER Investigation



## Process

- Initial Notice (after IER decides whether to pursue case)
  - IER will notify the Charging Party and Respondent within 10 days of receipt of charge
  - Data Request
    - Seeks information directly related to charge
    - May include a request for Forms I-9
    - Examines other aspects of a business' compliance with the IRCA anti-discrimination provision,
      - particularly focusing on documentary practices
  - Possible to negotiate scope and timing of documentary response

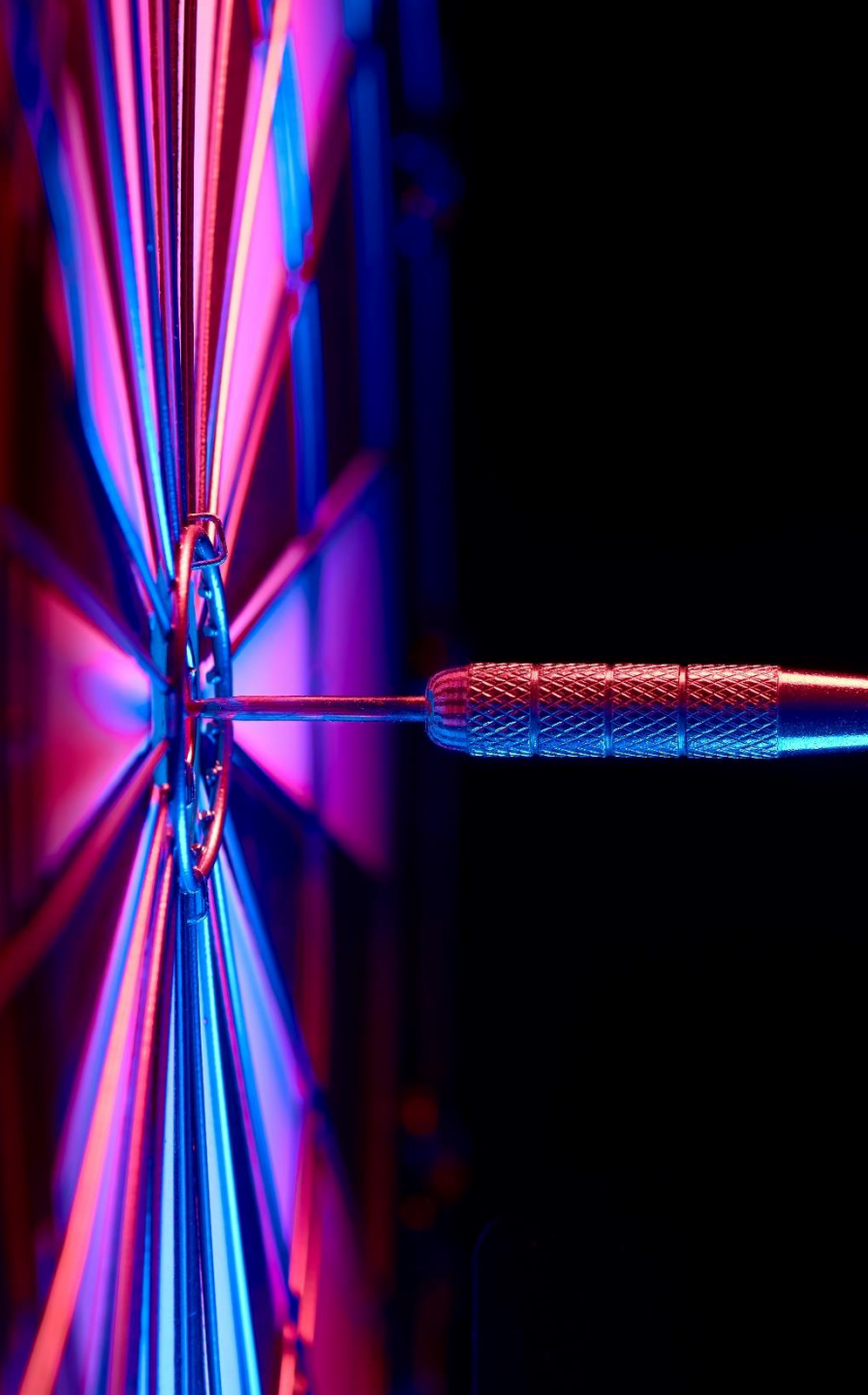
# Anatomy of an IER Investigation

Continued



## Next Steps

- IER has 120 days before Charging Party acquires the right to go directly before OCAHO
- Often, we see the 120-day letter noting the investigation is still open
- *Expect request for interviews and document production*
- IER may supplement both witness interviews and documentary requests as investigation progresses
  - Meaning multiple requests and multiple productions
- May file a complaint before **Office of the Chief Administrative Hearing Officer (OCAHO)**
- Jurisdiction of the OCAHO
- Coordinate Jurisdiction of the Equal Employment Opportunity Commission (EEOC)



## Best Practices for Responding to a Charge

- Understand the facts, do not assume
- Dig in and dig deep
- Interviews, data reviews, trends
- Stay ahead of the government, no surprises
- Communicate with the IER attorneys
- Don't be afraid to ask for reasonable extension, don't abuse extensions
- Be careful, yet creative when advocating for your company's defense – what is the narrative?
- Litigation hold, preservation
- Voluntary disclosures
- Remediation, forward facing

# How Investigations End

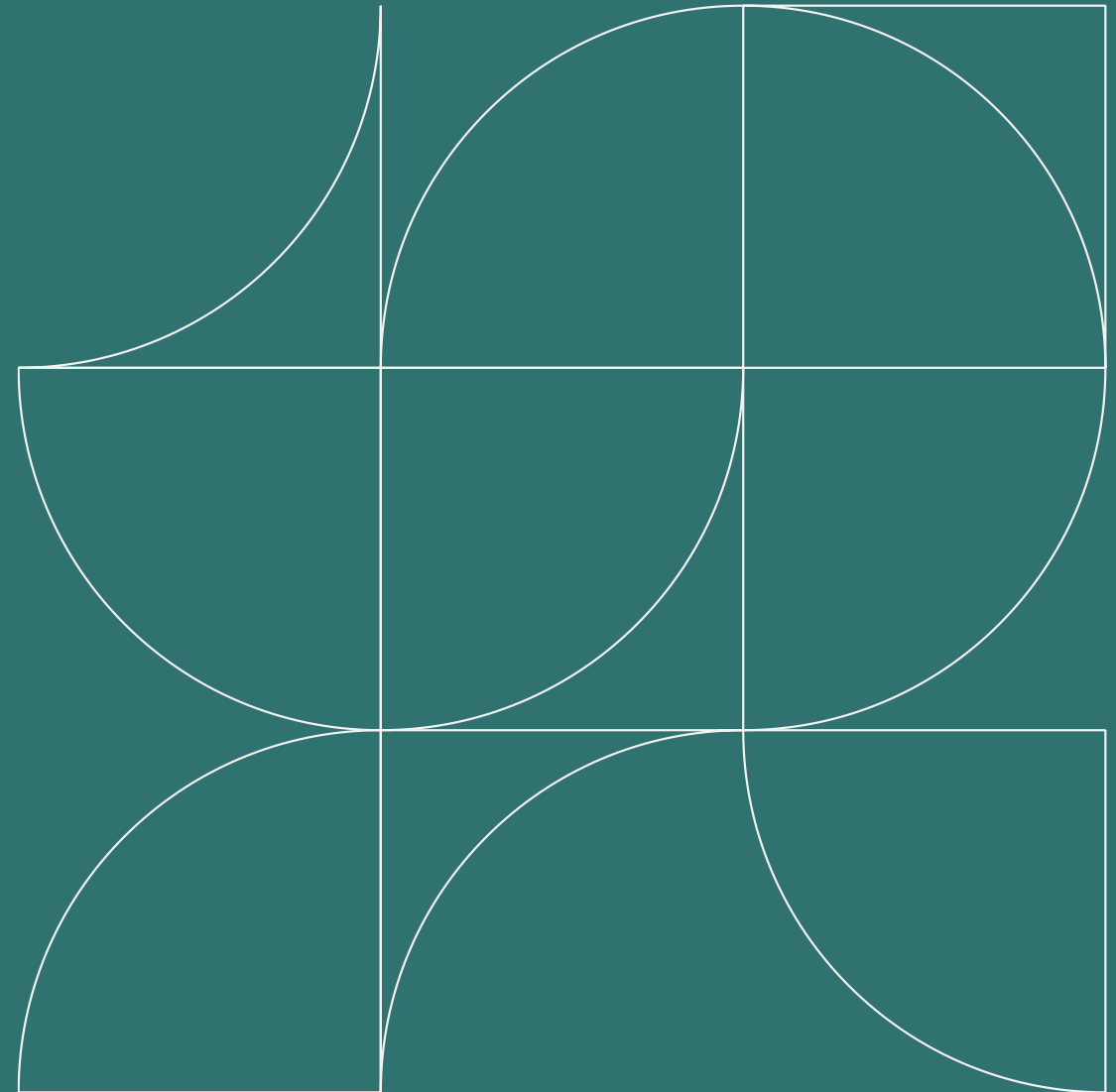
- Closure – occurs when:
  - IER finds insufficient evidence of violation; or
  - determines equities mitigate against filing of charges (very rare)
- Settlement
  - Standard terms
    - Employer neither admits nor denies liability
    - Civil monetary penalties
    - Back wages
    - Training and education
    - Antidiscrimination notice posting
    - Reporting and monitoring
    - Press releases
    - Possible exposure to suspension or debarment for federal contractors
- Filing of Charges with OCAHO



# Immigration Related Penalties

<b>Name/description</b>	<b>DOJ penalty assessed after 1/29/2018 (\$)</b>	<b>DOJ penalty assessed after 6/19/2020 (\$)</b>	<b>DOJ penalty assessed after 12/13/2021</b>	<b>DOJ penalty assessed after 5/9/2022</b>
<b>IRCA; Unfair immigration-related employment practices, first order (per individual discriminated against)</b>	<b>\$461 to \$3,695</b>	<b>\$481 to \$3,855</b>	<b>\$487 to \$3,901</b>	<b>\$517 to \$4,144</b>
<b>IRCA; Unfair immigration-related employment practices, second order (per individual discriminated against)</b>	<b>\$3,695 to \$9,239</b>	<b>\$3,855 to \$9,639</b>	<b>\$3,901 to \$9,753</b>	<b>\$4,144 to \$10,360</b>
<b>IRCA; Unfair immigration-related employment practices, subsequent order (per individual discriminated against)</b>	<b>\$5,543 to \$18,477</b>	<b>\$5,783 to \$19,277</b>	<b>\$5,851 to \$19,505</b>	<b>\$6,215 to \$20,719</b>
<b>IRCA; Unfair immigration-related employment practices, unfair documentary practices (per individual discriminated against)</b>	<b>\$185 to \$1,848</b>	<b>\$193 to \$1,928</b>	<b>\$195 to \$1,951</b>	<b>\$207 to \$2,072</b>

# Common Discrimination Complaints and Current IER Trends



# Unfair Documentary Practices

- Typical Scenarios
  - Requiring specific documentation
  - Requiring more documentation than required by I-9
  - Refusing valid documentation
- How to Avoid
- Beware of electronic I-9 systems
- Beware of electronic recruiting and onboarding applications
- Beware of mixing policies and other requirements (CDL, SS Card etc.)

# U.S. Citizen Preferences

## Not all contracts are created equal

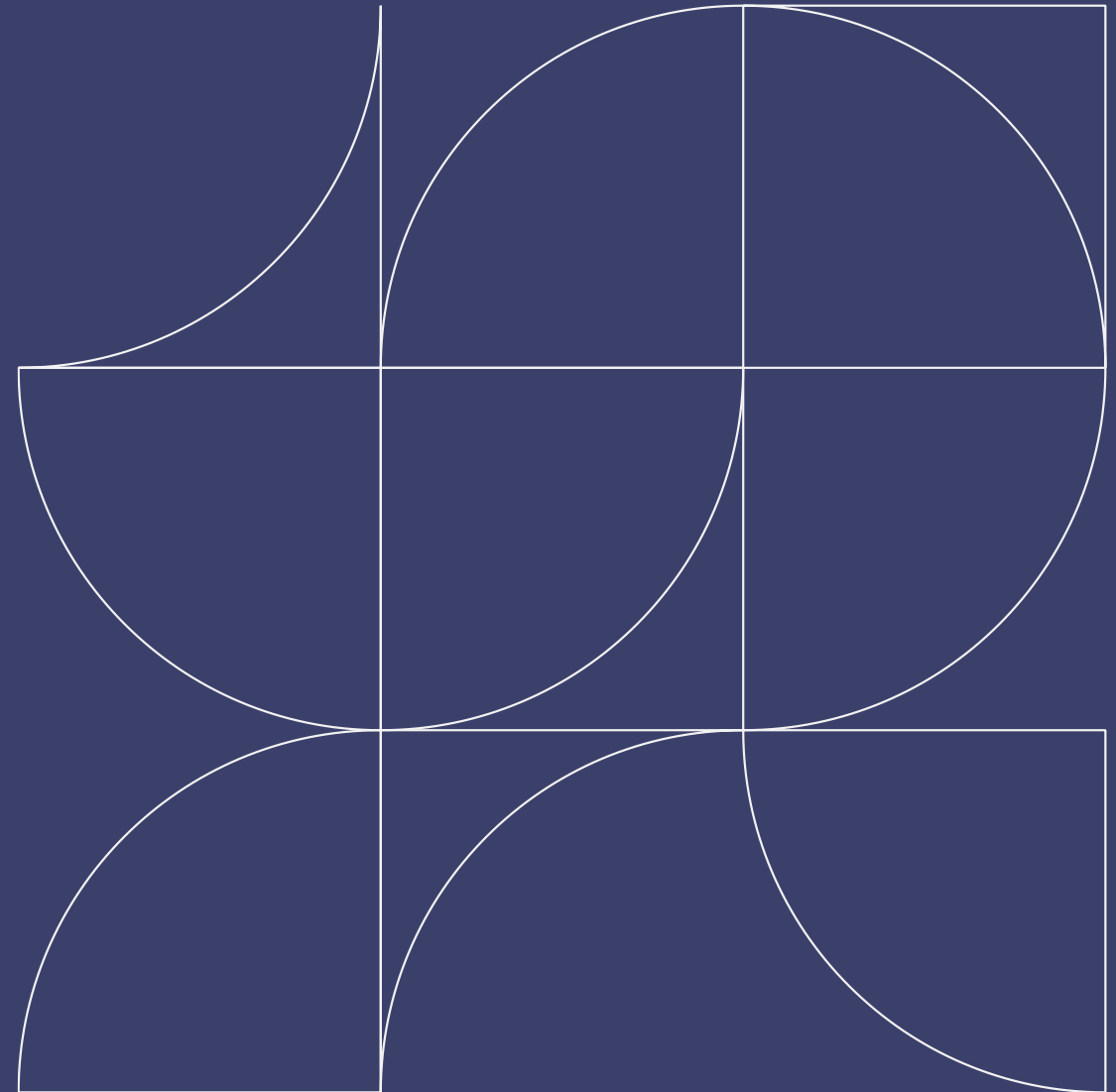
- Government contractors
  - Government contracts often DO have limitations on citizenship status of employees working contract
  - Limitations are often misunderstood or over-read
- Companies subject to the International Trafficking in Arms Regulations or Export Administration regulations
  - “Deemed export” theory
  - Often used as a basis to deny employment to non-citizens or non-U.S. person who may require an export license

# Sponsored Worker Preferences

## Optics and Realities

- Complaints from rejected applicants or terminated workers alleging:
  - preference for H-1B, H-2A or H-2B holders; or
  - exposure arising from labor certification process to favor foreign national workers
- Priority area for DOJ under both Republican and Democratic leadership
- DOL and EEOC involvement

# Recent Settlements



## Various Employers

### (Citizenship Status) June 2022

- Multiple employers
- Involved use of college recruiting platforms by multiple employers
- DOJ found that postings contained “**unlawful citizenship status restrictions**”
  - Specifically non-US citizens excluded
  - DOJ found that legally eligible applicants were deterred because of a job announcement excluding non-U.S. citizens on an online job recruitment platforms
  - DOJ determined that the advertisements deterred qualified students from applying for jobs because of their citizenship status, and the citizenship status restrictions also blocked students from applying or meeting with company recruiters
  - Total fines (among all 20 charged employers) of \$1.1 million

# Crop Harvesting Company

## (Citizenship Status) August 2022

- Found to have preferred H-2A (temporary agricultural worker) over U.S. citizens
- Civil penalty + back pay of \$14,165.10
- Post notices informing workers of their rights under the INA's anti-discrimination provision
- Train staff
- Be subject to departmental monitoring for three years

# Cleaning and Janitorial Services

## (Unfair Documentary Practices) October 2022

- IER's investigation determined that company routinely required **specific** documents from newly-hired non-U.S. citizens
- Company required LPRs to show green cards, and asylees and refugees to show their employment authorization documents to prove their permission to work
- U.S. citizens allowed to choose from among various acceptable document types
- Civil penalty of \$300,000 to the United States
- Train employees
- Departmental monitoring and reporting requirements for three years

## Staffing and Recruiting Company

### (Citizenship Status) July 2022

- IERs investigation found the company to have posted discriminatory ads based on preferences of its clients
- Restrictions found:
  - frequent preference for U.S. citizens and LPRs to the exclusion of other protected individuals (e.g. – refugees and asylees); and
  - one ad sought only H-1B visa holders
- Civil penalty and remediations requirements including revising policies and undergoing monitoring

# Home Health Care Services Company

## (Citizenship Status) March 2022

- IER's investigation found the discriminatory use of E-Verify
- Company found to only have used E-Verify for non-U.S. citizens
- Multiple corrective actions required
  - Prohibited from selectively using E-Verify to discriminate against employees based on their citizenship or immigration status
  - Must not track the expiration date of any documents presented by employees that do not require reverification including PR cards
  - Must train its employees on the requirements of the INA's anti-discrimination provision
  - Change and review its policies and procedures
  - Subject to monitoring for a three-year period

# Grocery Chain

- IER found that the discriminated against non-U.S. citizen workers when checking their permission to work in the US
- Non-U.S. citizen complained that company refused to accept valid documentation and required different documents- (LPR card)
- IER found company routinely required specific documents from newly-hired non-U.S. citizens to prove they had permission to work
- Settlement requires
  - extensive training on various internal system
  - revision of policies
  - subject to monitoring
  - backpay mandated
  - Posters must be posted

# Questions & Answers

