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DEPARTMENT OF JUSTICE

28 CFR Parts 0 and 44

CRT Docket No. 130; AG Order No. 3791-2016 No. RIN 1190-AA71

Standards and Procedures for the Enforcement of the Immigration and Nationality Act

AGENCY: Civil Rights Division, Department of Justice.

ACTION: Final rule.

SUMMARY: This rule revises the Department of Justice's (Department's) regulations implementing a section of the Immigration and Nationality Act (INA) concerning unfair immigration-related employment practices. The revisions conform the regulations to the statutory text as amended, simplify and add definitions of statutory terms, update and clarify the procedures for filing and processing charges of discrimination, ensure effective investigations of unfair immigration-related employment practices, reflect developments in nondiscrimination jurisprudence, reflect changes in existing practices (*e.g.*, electronic filing of charges), reflect the new name of the office within the Department charged with enforcing this statute, and replace outdated references.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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Employment Practices, Civil Rights Division, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 353-9338 (voice) or (800) 237-2515 (TTY).

SUPPLEMENTARY INFORMATION

Executive Summary

The anti-discrimination provision of the Immigration and Nationality Act (INA), section 274B, codified at 8 U.S.C. 1324b, was enacted by Congress as part of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99-603, to prohibit certain unfair immigration-related employment practices. Congress provided for the appointment of a Special Counsel for Immigration-Related Unfair Employment Practices (Special Counsel) to enforce this provision. Congress has amended 8 U.S.C. 1324b several times. On November 29, 1990, by section 535 of the Immigration Act of 1990, Public Law 101-649, Congress added a new subsection (a)(6) prohibiting covered entities from requesting more or different documents or rejecting valid documents during the employment eligibility verification process. *See* 8 U.S.C. 1324b(a)(6) (1994). On September 30, 1996, by section 421 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, div. C, Congress further amended that provision by providing that unfair documentary practices were unlawful only if done “for the purpose or with the intent of discriminating against an individual in violation of” 8 U.S.C. 1324b(a)(1). *See* 8 U.S.C. 1324b(a)(6) (2000). The Department has not updated the set of regulations implementing section 1324b, 28 CFR part 44, to reflect the statutory text as amended by IIRIRA. The revisions promulgated by this final rule apply to the Special Counsel’s investigations and to cases adjudicated under section 1324b.

The revisions to 28 CFR part 44 incorporate the intent requirement contained in the amended statute, and also change the regulatory provisions regarding the Special Counsel’s

investigation of unfair immigration-related employment practices. Specifically, the revisions update the ways in which charges of discrimination can be filed, clarify the procedures for processing such charges, and conform the regulations to the statutory text to clarify the timeframes within which the Special Counsel may file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). The revisions also simplify the definitions of certain statutory terms and define additional statutory terms to clarify the full extent of the prohibitions against unfair immigration-related employment practices and to eliminate ambiguities in the regulatory text. Additionally, the revisions codify the Special Counsel's existing authority to seek and ensure the preservation of evidence during investigations of alleged unfair immigration-related employment practices. The revisions also replace references to the former Immigration and Naturalization Service with references to the Department of Homeland Security (DHS), where applicable, in accordance with the Homeland Security Act of 2002, Public Law 107-296 (HSA).

Finally, the revisions reflect the change in the name of the office within the Department's Civil Rights Division that enforces the anti-discrimination provision, from the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) to the Immigrant and Employee Rights Section.

Summary of Changes to the Final Rule

The Department carefully considered the 47 individually-submitted comments received in response to the Notice of Proposed Rulemaking (NPRM) entitled Standards and Procedures for the Enforcement of the INA that was published in the Federal Register on August 15, 2016 (81 FR 53965). Following several commenters' requests for an extension of the original 30-day comment period, on September 14, 2016, the Department extended the comment period by an

additional 30 days, for a total of 60 days (81 FR 63155). The comment period closed on October 14, 2016. After consideration of the comments, the Department is making four changes: one change to the definition of “discriminate” at § 44.101(e) to make clear that intent to discriminate must be based on national origin or citizenship status in order to violate 8 U.S.C. 1324b; one change to § 44.101(k)(3) to make the regulatory language mirror the statutory language; one change to § 44.200(a)(3)(ii) to clarify the cross reference in that paragraph; and one technical change to § 44.300(d) to correct the citation to Title VII of the Civil Rights Act of 1964, as amended.

Background on Legal Authority

The authority to promulgate this rule lies in two sections of the INA. *See* 8 U.S.C. 1103, 1324b. By statute, the Special Counsel serves in the Department and enforces the anti-discrimination provision of the INA. 8 U.S.C. 1324b(c). The INA lays out the Attorney General’s authority to administer and enforce those laws within Title 8, United States Code, that are conferred upon the Attorney General. 8 U.S.C. 1103(a)(1). In addition to the Attorney General’s authority to administer and enforce laws expressly conferred to the Attorney General under the INA, “determination and ruling by the Attorney General with respect to all questions of law shall be controlling.” *Id.* The same section of the INA authorizes the Attorney General to “establish such regulations..., delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.” 8 U.S.C. 1103(g)(2); *see also* Homeland Security Act of 2002, Public Law 107-296, sec. 1102 (adding “(g)” as a “subsection” of section 1103); *Cormia v. Home Care Giver Servs., Inc.*, 10 OCAHO no. 1160, 3 (2012) (noting that “Congress gave the Attorney General the power to promulgate regulations to effectuate and enforce § 1324b, as well as the power to delegate that authority”) (citing 8 U.S.C.

1103(g)). In addition to the broad grant of authority to the Attorney General under 8 U.S.C. 1103, the anti-discrimination provision itself includes express delegations of rulemaking and other authorities to the Attorney General. *See, e.g.*, 8 U.S.C. 1324b(c)(4) (to establish regional offices); 8 U.S.C. 1324b(f)(2) (to ensure that administrative law judges hearing cases under the statute and the Special Counsel have “reasonable access” to examine evidence of persons or entities being investigated); *cf.* 8 U.S.C. 1324b(b)(1) (providing that charges “shall contain such information as the Attorney General requires”); 8 U.S.C. 1324b(e)(2) (providing that the Attorney General shall designate the administrative law judges who consider cases under section 1324b).

Discussion of Comments

The following section reviews comments the Department received in response to the NPRM and sets forth the Department’s responses to those comments. The Department received 47 comments on the NPRM by the close of the comment period, October 14, 2016. The Department’s responses to comments regarding this rule’s economic impact are included in the Regulatory Procedures section of this rule. Other comments are summarized below, along with the Department’s responses.

General Comments

Issue: Five commenters express support for the proposed rule, in whole or in part. One commenter “strongly supports the entirety of the Department’s proposed rulemaking.” Another commenter states that its employer members “generally support those sections of the proposed rule that will clarify existing investigation and enforcement procedures for the Special Counsel and update existing language to reflect statutory changes.”

Response: The Department acknowledges these expressions of support.

Issue: The Department received one comment two days before the close of the comment period requesting an extension of the comment period “until executive and legislative positions are filled in 2017.”

Response: The Department declines to grant the request made through this comment. The Department has provided a 60-day comment period, which is reasonable and appropriate. The Department has reviewed all comments carefully and sees no reason to delay the publication of this rule.

Issue: A number of commenters ask the Department not to promulgate the rule based on various concerns. The Department is addressing the specific concerns raised by these commenters below, by subject.

Response: The Department addresses below the specific concerns that these commenters raise. The Department will make this rule final as proposed with four changes.

Issue: One commenter asks the Department not to promulgate the rule on the basis that it is “ultra vires to the rule making authority and functions vested in the [Attorney General] and OSC by Congress.” This commenter cites to 8 U.S.C. 1103(g)(1) to support the commenter’s position that the Attorney General is limited to promulgating substantive rules under the INA relating only to the functions of the Executive Office for Immigration Review, another component within the Department. Based on that reading, this commenter claims that the Attorney General and Special Counsel lack the authority to issue rules “with regard to the interpretation and enforcement of the immigration-related anti-discrimination provisions of INA § 274B.” This commenter also claims that the Attorney General and the Special Counsel lack the authority “to regulate standards governing the order and burden of proof to be applied by administrative law judges (ALJs) and the courts for the purpose of evaluating claims of

citizenship or national origin discrimination, or document abuse.” This commenter points to the fact that the Attorney General and the Special Counsel have “refrain[ed] for 30 years from issuing rules regarding the burden and standard of proof governing claims of discrimination under INA § 274B” as an implicit recognition that “these adjudicative functions lie exclusively with OCAHO administrative law judges.” Another commenter describes the NPRM as an “unlawful, ultra vires, expansion of DOJ OSC power.”

Response: The Department disagrees with these comments and has decided that it will promulgate this rule. As discussed in the Background on Legal Authority section above, the Attorney General has the authority to promulgate this rule. While one commenter believes that 8 U.S.C. 1103(g)(1) precludes the Department from issuing these regulations, we contend that that paragraph cannot be read in isolation. As discussed above, 8 U.S.C. 1103(a)(1) together with subsection 1103(g)—and section 1324b—provide the Attorney General with the necessary authority to promulgate this rule. Furthermore, nothing in this rule alters the burden or standards of proof for assessing whether a person or entity has violated the statute, nor does the rule alter the authority of administrative law judges to adjudicate cases under section 1324b.

Issue: Two commenters express concern that the Department does not enforce this law sufficiently. One of these commenters expresses appreciation for the government’s interest in solving these problems, and states, “[t]hese immigrants, who are not being hired and wish to fight the prejudice” cannot combat discrimination in hiring because of “their lack of knowledge of the U.S legal system. They already have to face obstacles of coming to the United States and taking on a new challenge of trying to establish themselves and then business owners are denying them the basic rights every American is given.”

Response: Although the Department recognizes the challenges that many employment-authorized immigrants face in overcoming discriminatory barriers, the Department has vigorously enforced this law to combat the discriminatory barriers identified by the commenter. The Department also engages in extensive outreach to the public to educate workers and employers about their rights and responsibilities under this law. Moreover, promulgating this rule is critical to conforming the existing regulations to the law. Information about the Department's enforcement and outreach work under this law is available at <http://www.justice.gov/crt/about/osc>.

Issue: One commenter expresses concern that an employer that refuses to hire a worker who lacks employment authorization will be accused of discrimination, and that the employer that hires the same worker will be accused of violating the separate prohibition against knowingly hiring an unauthorized worker, found at 8 U.S.C. 1324a.

Response: The Department disagrees with the accuracy of the example set forth in this comment. Section 1324b protects only employment-authorized individuals from discrimination under the INA. 8 U.S.C. 1324b(a)(1) (“It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (*other than an unauthorized alien, as defined in section 1324a(h)(3) of this title*) . . .” (emphasis added)); *see also* 8 U.S.C. 1324a(h)(3) (defining “unauthorized alien” as an alien that is not “lawfully admitted for permanent residence” or “authorized to be so employed”). As a result, an employer’s refusal to hire a worker based on that worker’s lack of employment authorization does not violate the INA’s anti-discrimination provision. *See* 8 U.S.C. 1324b(a)(2)(C). The Department, along with DHS’s U.S. Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE), has issued several public education materials that discuss how employers

can avoid discrimination while also complying with legal requirements to verify employment eligibility and ensure they do not knowingly employ a worker who lacks employment authorization. For more information, visit www.justice.gov/crt/employer-information; <https://www.uscis.gov/i-9-central>; <https://www.ice.gov/sites/default/files/documents/Document/2015/i9-guidance.pdf>.

Office Name Change

Issue: One commenter disagrees with the proposal to change the name of the office that enforces section 1324b, from the Office of Special Counsel for Immigration-Related Unfair Employment Practices to the Immigrant and Employee Rights Section. The commenter claims that the new name “is . . . not in line with the statute” because section 274b(c) of the INA requires the President to appoint a Special Counsel to handle “Immigration-Related Unfair Employment Practices,” not for “Employee Rights” more generally. Moreover, the commenter claims that changing the name of the office will alter the Special Counsel’s authority to enforce the law.

Response: The Department disagrees with this comment. The statute does not prescribe a name for the office that enforces section 1324b and the change in office name does not affect the Special Counsel’s authority under the law. For the reasons discussed in the NPRM, in particular to eliminate public confusion regarding two offices in the Federal Government with the same name, the Department is changing the office’s name to the Immigrant and Employee Rights Section.

Comments Related to the Rule’s Interpretation of Discrimination

The Department received approximately 30 comments on the proposed rule’s revisions related to the meaning of discrimination under section 1324b, many of which cited § 44.101(e)

and (g) as areas of concern. Most of the comments about these proposed revisions raised one or more of the following concerns: (1) the proposed revisions seek to remove the statutory requirement to show discriminatory intent; (2) the proposed revisions seek to change the long-established evidentiary paradigms used by courts to determine whether discrimination has been proved; and (3) the proposed revision to § 44.200(a)(3) would remove a showing of “harm” to establish a violation.

Throughout the comments, many commenters expressed concerns that the proposed revisions would lead to “strict liability” for “innocent” or “unintentional conduct.” Some commenters indicate that the proposed revisions would lead to violations under the statute based on a disparate impact theory of discrimination. Other commenters object to the proposed revisions for not requiring that an employer act with ill will or animus in order to violate the statute.

The Department agrees that section 1324b requires a showing of intentional discrimination on the basis of a protected characteristic and that a violation cannot be established under a strict liability standard or a disparate impact theory. The Department’s position remains that ill will or animus is not required to commit discrimination under the statute. To the extent that the proposed revisions created any confusion on these points, the Department is discussing these comments in more detail below.

1. Comments on the proposed revisions’ effect on discriminatory intent. Most comments relating to the meaning of discriminatory intent under section 1324b address the definitions of “discriminate” at § 44.101(e) and the phrase “for the purpose or with the intent of discriminating against an individual in violation of paragraph (1)” at § 44.101(g). Regardless of whether the discussion is about discrimination in hiring, firing, or recruitment and referral for a fee in

violation of 8 U.S.C. 1324b(a)(1), or about discrimination in unfair documentary practices under 8 U.S.C. 1324b(a)(6), the analysis for determining discriminatory intent is the same so the Department will address comments on the topic of intent together.

Issue: One commenter expresses support for the definition of “discriminate” at § 44.101(e). This commenter states that the “clarity provided by the proposed regulation with regard to § 1324b(a)(6) is of particular importance because,” in the commenter’s experience, including that of its affiliate unions, “it is not uncommon for employers to require more or different documents for employment verification from non-citizens than from U.S. citizens, or from certain groups of workers based on their national origin as opposed to workers who ‘appear’ to be U.S. citizens.”

Response: The Department agrees with this comment and, as discussed in the NPRM, this definition clarifies what discrimination means under section 1324b. As the commenter suggests, and as discussed below, the definition of “discriminate” includes intentionally treating individuals differently from others because of a protected characteristic.

Issue: Several commenters believe that the proposed revisions seek to remove the discriminatory intent element from section 1324b altogether. Many of these commenters discuss at length the Ninth Circuit decision in *Robison Fruit Ranch, Inc. v. United States*, 147 F.3d 798 (9th Cir. 1998), in which the Court held that post-1996, a violation of 8 U.S.C. 1324b(a)(6) required a showing of discriminatory intent. *Id.* at 801. Numerous commenters provide the following example of a situation that the commenters believe could violate the law under the proposed revisions: a U.S. citizen decides unprompted to show a driver’s license and unrestricted Social Security card for the employment eligibility verification process while a lawful permanent resident decides unprompted to show a Form I-551 Permanent Resident Card. One commenter

further objects that the proposed definition of discriminate “appears to include *any employer conduct* regardless of whether that conduct is in any way related to an employee’s immigration status.” (emphasis in original).

Response: The Department agrees that the statute prohibits only intentional discrimination, and added paragraphs (e) and (g) to make that intent requirement clear. Indeed, for claims under section 1324b(a)(6), the regulations must be revised because the regulations in effect today include no intent requirement, even though the statute was amended to require discriminatory intent in 1996 and the Special Counsel has enforced the law as amended since 1996. However, in light of these comments, the Department is making one clarifying edit to the definition of “discriminate” in paragraph (e) to address any confusion. The Department is also more clearly explaining these proposed revisions to address any confusion about the meaning of discrimination and to reiterate that discriminatory intent is required in order to violate the statute.

As an initial matter, paragraph (e)’s definition of “discriminate” as proposed solely addressed what that term means, namely, “intentionally treating an individual differently from other individuals, regardless of the explanation for the differential treatment, and regardless of whether such treatment is because of animus or hostility.” In the sentence in which the term “discriminate” appears in section 1324b(a)(1), the statute makes clear that any discrimination must be “because of” a protected characteristic, *i.e.*, citizenship status or national origin. Reading the regulatory definition together with the statute, the language prohibits intentionally treating an individually differently from others because of a protected characteristic – the classic definition of disparate treatment discrimination. Nonetheless, based on the comments received, the Department recognizes the possibility that when read alone, paragraph (e)’s definition as proposed may create confusion. Therefore, the Department has decided to add language to the

regulatory text to make even clearer that the definition at paragraph (e) must be read together with the statute's broader prohibition against discrimination based on national origin or citizenship status.

To the extent that commenters believe the proposed revisions would seek to prohibit any difference in treatment whatsoever, the law and regulations make clear that only disparate treatment based on a protected characteristic is prohibited. *See* 8 U.S.C. 1324b(a)(1), (a)(6). Further, as discussed in the NPRM, a primary purpose of updating these regulations is to conform the regulations to the statute, which was amended in 1996 to provide that unfair documentary practices were unlawful only if done “for the purpose or with the intent of discriminating against an individual in violation of” 8 U.S.C. 1324b(a)(1). The definition at paragraph (g) makes clear that discrimination under 8 U.S.C. 1324b(a)(6) also requires “intentionally treating an individual differently based on national origin or citizenship status.”

The definitions in these paragraphs reflect longstanding black letter civil rights law and the Special Counsel's long-held position on what constitutes intentional discrimination under section 1324b. *See, e.g., City of Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 711 (1978) (finding sex discrimination where employer required female employees to make larger contributions than men to its pension fund because such treatment satisfies “the simple test of whether the evidence shows ‘treatment of a person in a manner which, but for that person's sex, would be different’”); *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991) (applying the “simple test” in *Manhart*). The holding in *Robison*, 147 F.3d 798, on which several commenters rely for their position that the Department is seeking to remove the intent requirement from the statute, is also in harmony with the Special Counsel's position. In that case, the Ninth Circuit held that “Congress intended a discrimination requirement in the 1990

statute and merely clarified the statute to state that intent in its 1996 amendment.” *Robison Fruit Ranch, Inc.*, 147 F.3d at 801. The Court did not find discrimination because the employer’s documentary requests were made to both U.S. citizens and non-U.S. citizens. *Id.* This decision is consistent with the Department’s position on what discrimination means under the statute.

While several commenters state that the Department’s proposed definition of discrimination is based exclusively on references to OCAHO decisions or the Special Counsel’s prior positions, the NPRM and this rule contain several references to seminal Supreme Court cases that support the Department’s proposed definition. Moreover, the suggestion that OCAHO case law is insufficient is misguided because Congress authorized OCAHO administrative law judges (ALJs) to decide cases under the statute. *See* 8 U.S.C. 1324b(e)(2).

In one example provided by a number of commenters mentioned above, a lawful permanent resident chooses to show a Permanent Resident Card for the employment eligibility verification process while a U.S. citizen provides a driver’s license and Social Security card, both “without any prompting by the employer.” The employer in this example would not face liability unless the employer was requesting specific, more, or different documents from workers for employment eligibility verification purposes because of the workers’ protected characteristic. If, however, the employer allows each worker to show his or her choice of valid documentation for the employment eligibility verification process, the employer would not be discriminating in violation of the statute.

Issue: A number of commenters object to what they claim is an attempt to apply a strict liability standard to “innocent” or “unintentional conduct” that lacks the necessary “ill will or animus.” One commenter points to the dictionary definitions of “discriminate,” claiming that the proper legal definition of “discriminate” involves “unfair or bad treatment,” and that if the

definition just meant “different” treatment, employers who engage in “innocent behavior [would be] swept up in the enforcement apparatus.” Another commenter states that Congress intended a showing of animus or ill will to establish a violation and the regulation should reflect that legislative intent. This commenter objects that the definition of “discriminate” would “actually apply to employers who intentionally treat individuals differently even if [the employers] want to help [the employees] through the employment eligibility process.” The commenter suggests that under the proposed revisions, providing sign language assistance to a worker completing the Form I-9 or allowing a family member or friend to serve as an interpreter could constitute intentional discrimination and violate the law. Other commenters provide different examples of conduct they see as helpful to a worker that they claim could be a violation of the law under the proposed revisions, such as an employer that asks a lawful permanent resident who neglects to include a USCIS/alien number in Section 1 “for documentation,” or an employer that says to a worker who selected lawful permanent resident in Section 1 of the Form I-9, “Oh, I see you are a permanent resident. Do you have your green card for completion of Section 2 [of the Form I-9]?” Two commenters share a similar example involving a human resources associate who seeks to assist new employees complete the Form I-9 by asking whether the employee is a U.S. citizen or born outside of the United States, and depending upon the answer, suggests specific documents that could satisfy Form I-9 requirements. Another commenter, relying on “good faith” defenses set forth in section 1324a, suggests that discrimination can never include “good faith efforts to verify the employment eligibility” of workers. This commenter also criticizes the NPRM’s use of language from *United States v. Life Generations Healthcare, LLC*, 11 OCAHO no. 1227, 22-23 (2014), arguing that the Department’s references to *Life Generations* fail to

support the proposition that discrimination in violation of section 1324b does not require ill will or malice.

Response: The Department disagrees that the law requires a showing of animus or ill will to establish discriminatory intent or that section 1324b recognizes a “good faith” defense to discrimination. An employer cannot justify discriminatory conduct simply by claiming a lack of ill will or animus, or that differential treatment based on citizenship or national origin is nevertheless legal because the employer is trying to assist workers in “good faith.” The Department’s position mirrors the Supreme Court’s and other courts’ analyses on what constitutes intentional discrimination in a variety of contexts, including the principle that explicit discrimination is disparate treatment even absent a malevolent motive, and is consistent with OCAHO case law. *See, e.g., Johnson Controls*, 499 U.S. at 199 (stating that, in the context of Title VII, “absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.”); *Life Generations Healthcare, LLC*, 11 OCAHO no. 1227 at 22-23 (“It is not required that malice or ill will be shown, and the absence of a malevolent motive does not alter the character of a discriminatory policy.”) (citing *Johnson Controls*)); *see also Kentucky Retirement Systems v. E.E.O.C.*, 554 U.S. 135, 161 (2008) (stating that, under the Age Discrimination in Employment Act (ADEA), “an otherwise discriminatory employment action cannot be rendered lawful because the employer’s motives were benign”); *Manhart*, 435 U.S. at 711 (articulating the “simple test of [sex discrimination as] whether the evidence shows ‘treatment of a person in a manner which but for that person's sex would be different’”); *E.E.O.C. v. Baltimore Cnty.*, 747 F.3d 267, 273 (4th Cir.

2014) (“To prove facial discrimination under the ADEA, a plaintiff is not required to prove an employer’s discriminatory animus.”); *Holland v. Gee*, 677 F.3d 1047, 1059 (11th Cir. 2012) (stating that in an employment discrimination case that “insofar as [a respondent] insists that there must be proof of ill will or ‘animus,’ that suggestion is misguided”); *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1049 (9th Cir. 2006) (stating that “ostensibly benign purpose” for differential treatment does not overcome discriminatory intent under the Fair Housing Act); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500-01 (10th Cir. 1995) (holding that “a plaintiff need not prove the malice or discriminatory animus of a defendant to make out a case of intentional discrimination where the defendant expressly treats someone protected by the [Fair Housing Act] in a different manner than others”). This same interpretation of discrimination has long been described in the Special Counsel’s public education materials, website, and outreach presentations. In short, a definition of discrimination that requires complainants to prove that an employer acted with ill will, hostility or animus, in addition to showing differential treatment on the basis of a protected characteristic, finds no support in the statutory text or case law.

While some commenters criticize the NPRM’s characterization of *Life Generations*, the *Life Generations* case makes clear that “a person has the intent to discriminate if he or she would have acted differently but for the protected characteristic.” 11 OCAHO no. 1227 at 29. The ALJ in *Life Generations* explained that the proper test to determine discriminatory intent asks whether the outcome or treatment received would have been different if the protected classes had been reversed. *Id.* at 22-23. The ALJ in that case found the requisite discriminatory intent because it was “evident ... that had the groups been reversed, the outcome would have differed” despite the fact that the human resources personnel “bore no hostile motives toward foreign-born

employees, and had no subjective discriminatory intent.” *Id.* In finding that the employer had the requisite discriminatory intent under section 1324b(a)(6), the ALJ relied on Supreme Court precedent establishing that “the absence of a malevolent motive does not alter the character of a discriminatory policy.” *Id.* at 23 (citing *Johnson Controls*, 499 U.S. at 199); *see also United States v. Gen. Dynamics Corp.*, 3 OCAHO no. 517, 1121, 1163 (1993) (“An employer knowingly and intentionally discriminates on a prohibited basis if it deliberately treats a job applicant differently on the basis of the applicant’s citizenship status regardless of the employer’s motivation for the discrimination.”). The proposed revisions correctly characterize the *Life Generations* ruling and are consistent with its analysis of discriminatory intent under section 1324b.

We further note that a number of the commenters’ examples would not violate the statute as long as the employers are not treating employees differently because of a protected characteristic. In one example, an employer allows an employee’s friend or family member to help translate the Form I-9 for the employee. Such an act would not be considered discrimination unless the employer allowed only certain employees to have a friend or family member assist in completing the Form I-9 based on citizenship status or national origin.

We agree that other commenters’ examples could raise potential violations, but this conclusion is based on the statutory language in effect for decades and the Special Counsel’s long-standing positions. In the example of the employer who asks a lawful permanent resident for documentation after the worker fails to provide a USCIS/alien number in Section 1, the employer would be discriminating in violation of section 1324b(a)(6) if the employer did not ask other workers for documentation to verify missing information in Section 1. In other words, if an employer requested that lawful permanent residents who failed to write their USCIS/alien

number show a document with that number, but did not request the same of U.S. citizens who left Form I-9 fields blank (*e.g.*, zip code or date of birth), that employer may well violate section 1324b(a)(6). More broadly, it is not clear from the example why the hypothetical employer would not simply ask the lawful permanent resident to write in the missing USCIS/alien number instead of asking for a document.

In another example, an employer that says to a lawful permanent resident, “Oh, I see you are a lawful permanent resident. Do you have your green card for Section 2?” may also be acting in violation of the law. Employers may not request specific documents for employment eligibility verification purposes based on a worker’s citizenship status or national origin. Regarding this specific example, lawful permanent residents do not have to show their permanent resident card or “green card” when they start working; if an employer requests specific documentation from lawful permanent residents but does not request specific documents of U.S. citizens, it would be discrimination. And as with the above example, the employer in this example would be liable under the current statutory language, regardless of whether the Department amended the implementing regulations.

Similarly, in the example involving a human resources associate asking for an employee’s citizenship status and then offering suggestions for documentation that the employee might have based on the answer, the act may indeed violate the law if the employer’s actions amount to requesting specific documents for employment eligibility verification purposes from workers based on their citizenship status or national origin.

The Department further notes that many of the examples provided by commenters characterize the act of asking for specific documents from workers during the employment eligibility verification process as “assistance.” The Department disagrees with this

characterization. Requesting specific employment eligibility verification documents from employees unnecessarily limits their choice of documentation. An employer that is interested in helping workers through the employment eligibility verification process should provide all workers with the Lists of Acceptable Documents and explain to them that they may present one List A document or one List B document and one List C document.

Because the text of section 1324b does not contain a “good faith” defense, unlike section 1324a, the Department will not insert such a defense to discrimination in the proposed revisions.

Issue: One commenter disagrees with changes to § 44.200(a)(1)’s description of the prohibition against discrimination in hiring, firing, recruitment and referral for a fee. Specifically, this commenter disagrees with the removal of the word “knowingly” and states, “one must ‘know’ they are discriminating to be liable under this intentional act” and that it was “illogical” for the Department to remove what the commenter believes is a “required element” for establishing a violation.

Response: The Department disagrees with this comment and is adopting the language from the proposed rule without change. The proposed revision properly reflects the statute’s requirement that a person or entity must engage in “intentional” discrimination. Further, the Department disagrees that a person or entity must know it is discriminating to violate the statute; as discussed in the responses to other comments above, the statute requires that an employer intentionally treat individuals differently based on their citizenship status or national origin. An employer’s “knowledge” that this disparate treatment constitutes “discrimination” is not an element of a violation.

Issue: A number of commenters disagree with the change in terminology in

§ 44.200(a)(3) from “documentation abuses” to “unfair documentary practices.” These commenters stated that these changes “blur[] the line of intent required” to establish a violation and are part of a “march toward strict liability.”

Response: The Department disagrees with these comments. As discussed in the NPRM, the change from “documentation abuses” to “unfair documentary practices” is intended to more clearly describe the prohibited conduct. In addition, this change in terminology more closely tracks the statutory language and has no impact on the intent required to prove a violation.

2. Comments regarding the proper evidentiary frameworks for establishing discrimination. Several commenters raise concerns that the proposed revisions do not comply with the proper evidentiary frameworks for analyzing discrimination claims.

Issue: A number of commenters claim that the rule’s definition of “discriminate” shifts the burden to the employer, contrary to well-established discrimination case law. Several commenters believe the proposed definition of “discriminate” “steamrolls over the substance and procedure of well-established Title VII law,” and, according to another commenter, converts cases under 8 U.S.C. 1324b to “disparate impact cases that are outside of OSC’s jurisdiction.” One commenter claims that the Department is seeking to import a complainant’s burden of proof at the liability stage in a pattern or practice case to the disparate treatment circumstantial evidence context. This commenter insists that paragraph (e)’s definition of “discriminate” in the NPRM “directly contradicts” the traditional burden-shifting framework recognized by OCAHO in *U.S. v. Diversified Technology and Services of Virginia, Inc.*, 9 OCAHO no. 1095, 13 (2003). Yet another commenter states that “[t]he proposed rule would essentially presume discrimination at the first stage.” Another commenter believes the proposed revisions would “effectively

remove the employer’s ability to offer any defense or non-discriminatory explanation for its actions.”

Response: The Department disagrees that the definition of “discriminate” or any other proposed revision alters the long-established evidentiary burdens to prove discrimination, but as discussed above has added clarifying language to the definition of “discriminate” to address any confusion about what is required to show discrimination in violation of the law.

Section 1324b is modeled after Title VII of the Civil Rights Act of 1964, and case law under that statute “has long been held to be persuasive in interpreting § 1324b.” *Sodhi v. Maricopa Cty. Special Health Care Dist.*, 10 OCAHO no. 1127, 7–8 (2008). The evidentiary frameworks set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), for individual claims of discrimination and in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360-62 (1977), for pattern or practice claims of discrimination apply to cases under section 1324b. The Department has consistently relied on such frameworks when litigating cases before OCAHO. Moreover, OCAHO has analyzed cases under section 1324b using these traditional frameworks, including in *Diversified Technology*, 9 OCAHO no. 1095, and *Life Generations*, 11 OCAHO no. 1227. The definition of “discriminate” in the proposed rule does not alter the parties’ respective burdens in a pattern or practice claim or individual claim, and the *McDonnell Douglas* and *Teamsters* frameworks set forth by the Supreme Court in interpreting Title VII continue to apply.

An example provided by several commenters helps to illustrate the traditional framework for establishing an intentional discrimination claim, which the proposed revisions do not change. In this example, an employer’s Forms I-9 show “that the overwhelming majority of non-citizens had provided a List A document (their [Form I-551 Permanent Resident] card), whereas the

overwhelming majority of U.S. citizens had provided a List B and a List C document,” and “the employer offers no guidance to new employees on completing the Form I-9 and accepts precisely the documents volunteered by the employees.” The commenters believe that under the proposed revisions and the recent OCAHO decision in *Life Generations*, 11 OCAHO no. 1227 at 22, the Special Counsel and OCAHO could nevertheless “find discriminatory intent by the employer, triggering sanctions.” This concern misinterprets the proposed revisions and the *Life Generations* case. Although statistical disparities can “serve an important role” in establishing a *prima facie* case of discrimination, *Teamsters*, 431 U.S. at 339-40, the employer’s action in the commenters’ example does not amount to discrimination because the employer did not request more, different or specific documents, or reject valid documentation, based on a protected class. Even assuming a different example where a complainant makes out a *prima facie* case of discrimination that includes statistical evidence showing that different protected classes presented different documents, the employer could then provide a legitimate, non-discriminatory reason for the statistical disparity. For instance, the employer may state that the employees volunteered to show those documents with no request by the employer. The complainant would then have an opportunity to offer evidence rebutting the employer’s legitimate non-discriminatory reason. Ultimately, the burden still rests on the complainant to prove that the employer requested specific documents from employees based on their protected class.

Given the above, the Department disagrees that the NPRM’s quotes from the *Life Generations* case are taken out of context. While *Life Generations* applied the evidentiary framework in *Teamsters*, the definition at paragraph (e) applies regardless of whether a case involves an individual claim of discrimination analyzed under *McDonnell Douglas*, a pattern or practice claim decided under *Teamsters*, or a case based on direct evidence of discrimination.

What the Department wishes to make clear in these proposed revisions, and specifically in the definitions in paragraphs (e) and (g) of § 44.101 that the Department is adopting in this rule, is that an employer cannot overcome evidence of discrimination simply by claiming that the discriminatory behavior (which in the context of unfair documentary practices would be requests for more, different, or specific documents, or the rejection of valid documentation, based on an employee's citizenship status or national origin) was somehow justified because it was meant to "help" workers or was not based on "ill will" or "animus." Such explanations cannot constitute legitimate, non-discriminatory reasons because, by their very terms, the explanations acknowledge that there is disparate treatment based on a protected class.

As noted above, the Department agrees that disparate impact liability is unavailable under section 1324b. None of the proposed revisions affects that conclusion.

Issue: In contrast to the comments above, one commenter believes that 8 U.S.C. 1324a offers the preferred framework over Title VII for interpreting discrimination under 8 U.S.C. 1324b. This commenter states that section 1324b "is not a 'stand-alone' anti-discrimination statute, and that [the Special Counsel] cannot interpret the statute as if it were. Rather, § [1324b] is irrevocably tethered to the scope of the employer sanctions regime, and [the Special Counsel's] regulatory jurisdiction does not extend beyond those anti-discrimination concerns that are reasonably related to employer sanctions or the employment verification requirements of § [1324a]." This commenter points to a shared historical context for the two provisions and the fact that 8 U.S.C. 1324a requires that employers treat certain individuals differently in particular contexts based on the lack of, type of, or duration of employment authorization. This commenter further states that "Congress intended § [1324b] . . . to account for the particular complexities in the immigration field that differ from the broader and more absolute prohibitions against

employment discrimination in the Title VII context,” and that “§ [1324b] stands . . . on a different footing from other types of employment discrimination.”

Response: The Department does not believe any change to the rule is required by this comment. It is well-accepted that section 1324b should be read within the context of the overarching scheme that Congress created in IRCA. However, employers that comply with section 1324a can also comply with section 1324b, and the fact that the law requires employers to treat employees differently based on their immigration status in some instances under section 1324a does not justify using a different standard for what discrimination under section 1324b means, thereby departing from black letter civil rights law and the Special Counsel’s long-held positions. OCAHO has long looked to Title VII case law in interpreting section 1324b. *See Sodhi*, 10 OCAHO no. 1127 at 7-8 (“Because § 1324b was expressly modeled on Title VII of the Civil Rights Act of 1964 as amended . . . case law developed under that statute has long been held to be persuasive in interpreting § 1324b.”). The Department agrees with OCAHO precedent that the evidentiary frameworks and principles that the Supreme Court has established to analyze employment discrimination cases under Title VII are highly instructive in interpreting section 1324b.

The Department also disagrees with the commenter’s suggestion that because section 1324a requires employers to treat certain individuals differently in particular contexts based on their employment authorization, citizenship status and national origin should be viewed as qualitatively different than other protected classes. Section 1324b carefully lays out the available exceptions to the general prohibition against discrimination based on citizenship status or national origin. *See* 8 U.S.C. 1324b(a)(2)(A), (a)(2)(C), (a)(4). Apart from those exceptions, the

Department believes that citizenship status and national origin should be viewed and analyzed in the same manner as any other protected class for discrimination purposes.

3. Comments on the “harm” required to establish a violation of section 1324b(a)(6).

The Department received a number of comments regarding how, if at all, the proposed revisions would change the conduct required to establish an unfair documentary practice, namely, what is required to establish a “harm” under the statute.

Issue: One commenter expresses support for the proposed revisions to § 44.200(a)(3), and states that it is “entirely consistent with the statute’s remedial scheme to allow OSC or a private complainant to seek to remedy unfair documentary practices even where no employee has experienced economic harm, as both reviewing courts and administrative law judges have held.”

Response: The Department appreciates this comment.

Issue: A number of commenters state that this rule would remove the requirement to show an individual was “harmed” to establish liability. The commenters do not specify what they refer to as “harm,” though some specifically pointed to the proposed revision’s clarification at § 44.200(a)(3)(ii), which explains that a violation of section 1324b(a)(6) does not require proof of an “economic harm.” Another commenter states that discrimination under section 1324b(a)(6) must include some harm other than just treating people differently, such as “unfavorable” treatment or “abusive” behavior.

Response: The Department believes no change is warranted by these comments. As discussed above, a finding of a violation under the law is premised on a showing of discrimination. As discussed in the NPRM, the statutory text does not include any language requiring an economic injury to establish a violation under section 1324b(a)(6). Moreover, the

harm or “unfavorable” treatment in a claim under section 1324b(a)(6) is subjecting a worker to a discriminatory document request or rejection based on the worker’s citizenship status or national origin. This has been the statutory requirement since the 1996 amendments, and the proposed revisions make no change to the elements required to establish a violation.

Definitions

The Department received several comments regarding the definitions in § 44.101 and discusses them below.

Issue: The Department received one comment on the definition of “charge” in paragraph (a). The commenter disagrees with the change in this definition to eliminate the requirement upon a charging party to identify the injured party’s specific immigration status to satisfy the regulatory definition of a charge. According to this commenter, this change may cause the Special Counsel to “not properly allocate its resources” because the Special Counsel would not have information about immigration status. The comment also states that if the Department has eliminated the requirement to provide immigration status information “because persons in the U.S. are sometimes unclear as to their legal status, then that point further evidences the complexity of this system for employees and employers alike.”

Response: The Department declines to change this definition as proposed. The charging party is still required to provide citizenship status information, and nothing in the regulations prohibits the Special Counsel from requesting additional information, as needed, regarding the injured party’s immigration status. As discussed in the NPRM, immigration status information is not required to determine whether the Special Counsel has jurisdiction to investigate an alleged unfair immigration-related employment practice, and the Department will not require this information to deem a submission to constitute a charge under § 44.101(a). The Department

does not believe that the absence of this information upfront from a charging party will have any effect on its ability to properly allocate resources.

Issue: The Department received a number of comments on the definition of charging party in paragraph (b) and its cross reference to the “injured party” definition in paragraph (i). These commenters disagree with the use of the term “injured party,” which is defined as “an individual who claims to be adversely affected directly by an unfair immigration-related employment practice.” 28 CFR 44.101(i). The commenters state that referring to the person claiming an injury as “injured” before making a determination on the merits of the claim “essentially presumes that which must be proven, suggesting an effort to write out of the statute the requirement to prove ‘adverse effect’ and moving to a ‘strict liability’ standard.” The commenters believe that “a party should be a ‘charging party’ or an ‘individual’ until they have proven that they are ‘injured.’” Another commenter believes the charging party definition should remain as it is or changed to “a neutral term, such as ‘claimant’” in order “to eliminate the impression, even if only subliminally, that an individual filing a claim has been ‘injured.’”

Response: The Department disagrees with the commenters’ suggestion that by simply using the term “injured party,” the Department is making a judgment on the merits of a claim. “Injured party” is defined as “an individual who claims to be adversely affected” in order to avoid any presumption of the merits of the claim. This term has also been in the regulations since they were initially promulgated in 1987 without impacting the impartiality of the Special Counsel’s investigations. *See Unfair Immigration-Related Employment Practices*, 52 Fed. Reg. 9277 (Mar. 23, 1987) (codified at 28 CFR pt. 44). An “injured party” may or may not be a “charging party” as the statute allows that a person acting on behalf of an individual who “is adversely affected directly by an unfair immigration-related employment practice” may also file

a charge. 8 U.S.C. 1324b(b)(1). The Department declines to make any changes to the definition of “charging party” or “injured party” as proposed.

Issue: The Department received three comments about the definition of “citizenship status” in paragraph (c). One commenter requests that the Department define “citizenship status” using a “flexible definition of immigration status” that includes individuals whose status is unclear. Another commenter believes that the Department is seeking through this definition to expand the class of individuals protected from citizenship status discrimination beyond those who meet the “protected individual” definition in 8 U.S.C. 1324b(a)(3) to include all non-citizens. A third commenter claims that the statute provides no basis to include “immigration status” in the definition of “citizenship status.” This commenter also stated that the term “immigration status” is ambiguous and would require human resources personnel to be “immigration law expert[s]” to determine what it means.

Response: The Department disagrees with these comments and will adopt the language of the proposed definition without change. The proposed definition does not address the issue of or attempt to modify the classes of individuals who are protected from unfair immigration-related employment practices under the statute. Rather than addressing particular immigration statuses, this definition simply makes clear that “citizenship status” connotes more than just whether an individual is or is not a U.S. citizen, and also includes a non-U.S. citizen’s immigration status. *See, e.g., Kamal-Griffin v. Cahill Gordon & Reindel*, 3 OCAHO no. 568, 1641, 1647 (1993) (“Congress intended the term ‘citizenship status’ to refer both to alienage and to non-citizen status.”). In addition, understanding what constitutes immigration status discrimination does not require human resources personnel to be immigration experts. To comply with this law, the employer does not need to know the intricacies of a particular

immigration status or what an individual needs to show to qualify for employment given such a status. Rather, if an employer, based on an individual's immigration status, treats that individual differently in the hiring, firing, recruitment or referral for a fee process, or commits an unfair documentary practice, the employer may violate the law. Using an example from the NPRM, an employer that refuses to hire a refugee based on that person's status as a refugee may well violate section 1324b(a)(1).

Issue: The Department received three comments on paragraph (f)'s definition of "for purposes of satisfying the requirements of section 1324a(b)." One commenter expresses support for paragraph (f)'s definition of "for purposes of satisfying the requirements of section 1324a(b)" as "a reasonable construction of the statutory language."

Two commenters raise concerns that paragraph (f) is overly broad. The first commenter believes the statute's prohibition against unfair documentary practices is unambiguous and refers only to the Form I-9 process. This commenter claims that the use of E-Verify does not "satisfy the requirements of [section] 1324a(b)" because the statute authorizing E-Verify does not explicitly reference section 1324a(b), and therefore discrimination in the use of E-Verify cannot constitute an unfair documentary practice under 8 U.S.C. § 1324b. This commenter further believes that under the definition in the proposed rule, employment processes that have nothing to do with satisfying the requirements of section 1324a(b) would be covered, such as requesting documents as part of vaccination law compliance, tax law compliance, and criminal background checks. The second commenter states that section 1324b(a)(6) does not cover discrimination involving E-Verify because Congress was aware of electronic verification when it amended section 1324b in 1996 and chose not to include "any electronic system" in section 1324b.

Response: The Department declines to make any change to this definition as proposed in the NPRM. As noted in the NPRM, OCAHO has recognized that unfair documentary practices can occur outside of the actual completion of the Form I-9. For example, discriminatory documentary requests at the application stage to verify employment eligibility can constitute unfair documentary practices in violation of the law. *See United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 11 (2012) (recognizing potential liability for unfair documentary practices committed against job applicants).

Discriminatory documentary practices, such as requesting more or different documents or rejecting valid documentation, in the E-Verify process likewise violate 8 U.S.C. 1324b(a)(6). The E-Verify process flows from and is inextricably intertwined with 8 U.S.C. 1324a(b), and E-Verify's primary purpose is to assist employers with confirming an individual's work authorization status once the individual and the employer have completed the Form I-9 as required by 8 U.S.C. 1324a(b). Contrary to one commenter's assertion, the E-Verify statute, found at 8 U.S.C. 1324a note, explicitly references 8 U.S.C. 1324a(b) in several places. *See, e.g.*, 8 U.S.C. 1324a note, secs. 403(a)(2)(A); 403(a)(2)(B)(ii); 403(a)(4)(A); 403(b)(2)(A); 403(b)(3); 403(b)(4); 403(c). Moreover, when Congress created several pilot programs in 1996, including what would later be named E-Verify, Congress mandated reports at the end of the third and fourth years of the pilot projects to assess, among other things, the degree to which these programs "assist in the enforcement of section 274A" of the INA. 8 U.S.C. 1324a note, Sec. 405(a)(3). While Congress authorized the electronic program that would be later named E-Verify at the same time that it last amended section 1324b(a)(6), the electronic program did not launch until 1997. *History and Milestones of the E-Verify Program*, U.S. Citizenship and Immigration Services, <https://www.uscis.gov/e-verify/about-program/history-and-milestones>

(last updated July 15, 2015). Therefore, it is no surprise that Congress did not include a reference to this program in the 1996 amendments to section 1324b(a)(6).

Because an employer's use of E-Verify is inextricably intertwined with "the requirements of section 1324a(b)," the use of E-Verify is covered by the definition. However, to the extent that an employer adopts a practice that does not have the purpose of verifying employment authorization, such as making document requests for tax or vaccination purposes, that practice would fall outside the scope of the definition and the law's prohibition against unfair documentary practices.

Issue: Several commenters express concern about the definition of "hiring" at paragraph (h). One commenter claims that this definition "would now include an unlimited range of employer activity," and that "any employer conduct may constitute discrimination (regardless of intent) during the pre-hire process." This commenter also raises concerns that this new definition would interfere with an employer's ability to ask applicants general questions about eligibility to work in the United States and to ask questions associated with a post-hire background check, including asking an applicant to identify the applicant's country of origin, present an identification document from the applicant's country of origin, or respond to questions about issues that arise in the background check.

One commenter raises a concern that the proposed definition is so broad that it would "require every person working for a single employer to be a Form I-9 expert" and suggests that the proposed definition would expand liability for employers based on the acts of those who are not "decision maker[s]," using, as one example, an 18-year old assembly line worker who tells his sibling that his employer is hiring and to "go to the office" and "bring your license, social security card and green card."

Other commenters criticize the definition's inclusion of "recruitment" and "onboarding." These commenters cite to *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 11 (2012) and *Mid-Atlantic Reg'l Org. Coal. v. Heritage Landscape Servs.*, 10 OCAHO no. 1134, 8 (2012), as support for a narrower definition of "hiring" that would include only "the entire selection process." The commenters argue that there is only one reference to "recruitment" in both 8 U.S.C. 1324a and 8 U.S.C. 1324b, namely, "recruitment or referral for a fee," and therefore argue that the statute does not apply to a prospective employer's pre-hire activity like recruitment. The commenters further claim that there is no authority to include "onboarding" processes like training or new employee orientation in this definition.

Response: The Department declines to make any changes to this definition as proposed in the NPRM. Nevertheless, based on comments received, the Department offers further clarification below. The Department's proposed definition of "hiring" is in line with OCAHO case law and the Special Counsel's longstanding position that discrimination at any point in the hiring process can violate the statute. At the outset, an employer that asks all applicants whether they are eligible to work would not violate the statute because there would be no differential treatment based on citizenship status or national origin. As a result, and contrary to one commenter's concern, this proposed definition would not affect an employer's ability to ask all job applicants about eligibility to work in the United States.

The Department further disagrees that this definition imputes any liability to an employer for acts of employees that could not already be imputed to an employer under the statute, regulations in effect today, and relevant case law. The question of when an employer is liable for the acts of its employees is very fact-specific and is not addressed by this proposed definitional change.

Although the Department agrees that recruitment as used in paragraph (h) could not include “recruitment for a fee,” the Department distinguishes between “recruiting” that occurs in the process of hiring an individual and “recruiting for a fee” as used in the statute. While recruitment by an employer is the act of soliciting applicants and applications, recruiting for a fee involves a third party soliciting applicants as a paid service to an employer. The Department believes that an employer soliciting applicants and applications must be included in the definition of “hiring” because such recruiting activity is an integral part of the selection process. Recruiting may impact, and in some cases determine, who learns about the job vacancy, who applies for a position, and who is selected for a position. Including recruiting in the definition of “hiring” is also supported by OCAHO case law. *See, e.g., Mid-Atlantic Reg'l Org. Coal.*, 10 OCAHO no. 1134 at 8 (noting that section 1324b “specifically applies to recruitment for employment as well as to hiring”). Finally, the statute’s explicit reference to “recruitment for a fee” by a third party does not mean that an employer’s hiring efforts cannot encompass both recruitment of and selection of prospective employees.

The definition of “hiring” must also include the onboarding process to capture all of the steps necessary to select individuals and place them in positions to work. Employers vary widely in their terminology, practices, and views regarding what steps are necessary to complete the selection process. For instance, some employers make a job offer, which the employee accepts, but which is conditioned implicitly or explicitly on meeting other requirements like passing drug tests, completing a formal application, or completing the Form I-9. This “selection” of a candidate is only tentative; it is not final because it is conditioned on the completion of other tasks.

Including onboarding in the definition of “hiring” would ensure that all these steps to place an individual in a position to start work are covered by the statute. For instance, the definition would capture such practices as discriminatory background checks that may occur after a conditional offer is made and accepted, but before actual employment begins. To the extent that employers impose background checks on new hires in a discriminatory manner based on citizenship status or national origin, this could violate the law. Finally, an employer that requests documentation as part of the background check process as a proxy for verifying authorization to work based on a worker’s citizenship status or national origin, may violate the statute’s prohibition against discrimination in hiring, in addition to the prohibition against unfair documentary practices.

This view is consistent with OCAHO case law, which has “long held that it is the entire selection process, and not just the hiring decision alone, which must be considered in order to ensure that there are no unlawful barriers to opportunities for employment.” *Id.* For instance, in *United States v. Townsend Culinary, Inc.*, 8 OCAHO no. 1032, 454, 510-11 (1999), OCAHO found that discrimination in the employment eligibility verification process (which occurred at the onboarding stage) violated not only the statute’s prohibition against unfair documentary practices but also the statute’s general prohibition against discrimination in hiring, firing, and recruitment or referral for a fee under 8 U.S.C. 1324b(a)(1).

Issue: The Department received one comment on the definition of “more or different documents than are required under such section” in paragraph (j). This commenter believes that the statute does not provide support for the definition’s inclusion of “any limitation on an individual’s choice of acceptable documentation to present to satisfy the requirements of 8 U.S.C. 1324a(b).” This commenter also believes the definition is confusing because Form I-9

rules already impose limitations on which documents individuals completing the Form I-9 may present. The commenter further raises the example of E-Verify's requirement that an individual who chooses to show a List B document for the Form I-9 for an employer that uses E-Verify can only show a List B document that contains a photo.

Response: The Department disagrees with this comment and is adopting the definition as the Department proposed with no change. For the reasons discussed in the NPRM, OCAHO case law supports the reading of the statute reflected in this definition, and the Special Counsel's longstanding position has been that discriminatory requests for specific documents violate the statute. *See, e.g., Townsend Culinary, Inc.*, 8 OCAHO no. 1032 at 507; *United States v. Strano Farms*, 5 OCAHO no. 748, 206, 222–23 (1995); *United States v. Beverly Ctr.*, 5 OCAHO no. 762, 347, 351 (1995); *United States v. A.J. Bart, Inc.*, 3 OCAHO no. 538, 1374, 1387 (1993); *see also United States v. Zabala Vineyards*, 6 OCAHO no. 830, 72, 85-88 (1995) (holding, prior to the enactment of IIRIRA, that 8 U.S.C. 1324b(a)(6) did not prohibit an employer's request for specific documents "in the absence of evidence that . . . aliens but not other new hires were required to rely on and produce specific documents").

Regarding the comment that the definition is confusing in light of existing limitations on the documents individuals can provide, the examples the commenter provides do not involve an employer imposing a limitation based on an individual's citizenship status or national origin. The fact that Form I-9 rules impose, as the commenter states, "limitation[s] on the documents that may be presented" does not implicate a specific discrimination concern. In the commenter's example involving an E-Verify user, if an employer specifies that a worker who wishes to show a List B document can only show a List B document with a photo based on the employer's use of E-Verify, and applies this E-Verify obligation consistently regardless of its workers' citizenship

status or national origin, the employer would not violate the statute because of that specification. However, an employer that imposes limitations on the types of valid and acceptable Form I-9 documents a worker can present due to the worker's protected class is likely to violate the statute.

Issue: The Department received one comment on the definition of "protected individual" in paragraph (k). This commenter raises a concern that the definition excludes lawful permanent residents who do not apply for naturalization within six months of the date the lawful permanent resident first becomes eligible.

Response: The Department will not make the change proposed by the commenter because the definition of "protected individual" comes directly from the statute at 8 U.S.C. 1324b(a)(3), and only Congress can change the meaning of "protected individual." However, the Department is modifying the definition of "protected individual" to make the regulatory language mirror the statutory language by adding the words "granted the status of" to paragraph (k)(3).

Issue: One commenter expresses support for the definition of "recruitment and referral for a fee" in paragraph (l) and also asks the Department to clarify that "the exclusion of union hiring halls applies to" this definition "in the same manner as [the exclusion] applies to the parallel phrases in 8 C.F.R. § 274a.1(d) & (e)."

Response: The Department agrees with the commenter that the definition at paragraph (l) as proposed excludes union hiring halls. This definition has the same meaning as "recruit for a fee" and "refer for a fee," respectively, in 8 CFR 274a.1, and those definitions expressly exclude union hiring halls as well.

Issue: One commenter requests that the Department add a definition to the rule to “clarify that [section 1324b of] the INA protects all work authorized individuals from unfair documentary practices.” This commenter believes the proposed rule “does not adequately guard all work-authorized individuals from unfair documentary practices.” The commenter states that while there is a conflict in the case law on this issue, it believes that “the more persuasive cases hold that the prohibition on document abuse, 8 U.S.C. §1324b(a)(6), extends to all work-authorized individuals.”

Response: The Department declines to add regulatory language addressing this issue. The Department notes that the revised rule incorporates the amended statutory language found in 8 U.S.C. 1324b(a)(6).

Charge Processing

Issue: A number of commenters raise concerns about paragraph (d) of § 44.301, which allows a 45-day period for a charging party to provide requested information to allow the Special Counsel to determine whether to deem what is initially an inadequate submission a charge. Some commenters believe that there is no statutory support for the use of such a grace period, pointing to what the commenters believe are “specific and relatively strict filing deadlines.” Another commenter claims that the proposed revision would “in practice all but eliminate” the 45-day period because the Special Counsel could proceed to investigate while waiting for the missing information even if the individual never provides the information.

Response: The Department disagrees with these comments and is adopting the language as the Department proposed with no changes. The Department agrees with commenters that the statute requires that the charging party file a charge within 180 days of the alleged unfair immigration-related employment practice. However, the statute also gives the Attorney General

broad discretion to determine what information is necessary to constitute a charge. 8 U.S.C. 1324b(b)(1) (“Charges shall be in writing under oath or affirmation and shall contain such information as the Attorney General requires.”). Pursuant to the authority granted in 8 U.S.C. 1324b(b)(1), the Attorney General has provided several ways a charging party can meet its charge filing obligations. First, a charging party can timely file a charge that on its face satisfies the definition of “charge” at § 44.101(a). Second, a charging party can file a submission that is “inadequate to constitute a complete charge as defined in §44.101(a)” but then provide additional information to make the charge “complete.” Section 44.301(d)(1) and (d)(2). Third, the Special Counsel can deem a submission to “be a complete charge even though it is inadequate to constitute a charge as defined in § 44.101(a).” Section 44.301(e). As long as the initial submission is timely, nothing in the statute prevents the Attorney General from later deeming the submission to be a charge.

The Department’s regulations on the handling of inadequate submissions are consistent with case law interpreting similar statutory language in Title VII. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106, 109 (2002) (upholding an EEOC regulation that permitted “an otherwise timely filer to verify a charge after the time for filing has expired.”). Like section 1324b, Title VII contains time limits for filing charges. 42 U.S.C. 2000e–5(e)(1). Title VII also contains language nearly identical to the language in 8 U.S.C. 1324b(b)(1). 42 U.S.C. 2000e-5(b) (“Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.”). Like the Department, the EEOC has promulgated regulations governing what information is required to file a charge. *See* 29 CFR 1601.12(a) (laying out information to be contained in a charge); 29 CFR 1601.12(b) (providing that notwithstanding the requirements for a charge’s contents in paragraph (a), a charge can be

“amended” to “cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein” and that amendments regarding acts “related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received.”). The Supreme Court in *Edelman* upheld the EEOC’s rule regarding charges filed under Title VII as “reasonable.” 535 U.S. at 114. While the Department is adopting regulatory language distinct from that in the EEOC’s regulations, the same reasoning supports the Attorney General’s authority to determine the information required for a charge and to adopt these regulations regarding charge processing.

Moreover, the Department’s decision to maintain a 45-day grace period for submitting additional information promotes certainty and finality for respondents and the Special Counsel by using a definite timeframe for the charging party to provide the requested information. The regulations are necessary to prevent the Special Counsel from investigating claims that clearly fall outside of its jurisdiction, while at the same time ensuring that timely-filed meritorious submissions that may be missing some information can still be considered timely. The statute’s remedial purpose would be frustrated, and meritorious claims would be foreclosed, if the Special Counsel imposed a harsh and rigid rule requiring dismissal of timely-filed charges that may allege a violation of section 1324b, but that do not initially set forth all the elements necessary to be deemed a complete charge.

Issue: One commenter writes in support of § 44.301, which sets forth how the Special Counsel handles submissions and charges received more than 180 days after the date of alleged discrimination. This commenter appears to refer to language in paragraph (g) that provides that the Special Counsel shall dismiss charges and submissions received more than 180 days after the

date of alleged discrimination “unless the Special Counsel determines that the principles of waiver, estoppel, or equitable tolling apply.”

Response: The Department appreciates this comment. As discussed more in the NPRM, these principles are well-established in relevant administrative decisions. *See, e.g., Lardy v. United Airlines, Inc.*, 4 OCAHO no. 595, 31, 73 (1994); *Halim v. Accu-Labs Research, Inc.*, 3 OCAHO no. 474, 765, 779 (1992).

Issue: The Department received three comments criticizing the proposed language in § 44.301(g) regarding the acceptance of charges more than 180 days after the alleged violation where principles of waiver, estoppel or equitable tolling apply. One commenter objects to § 44.301(g)’s lack of express language describing the frequency with which the principles of waiver, estoppel, or equitable tolling will apply. Another commenter claims that it is “not appropriate” for the Special Counsel “to accept late filings at its discretion” because it “subjects employers to uncertainty and lack of finality.” A third commenter states that these “‘equitable’ provisions provide the Special Counsel with immense leeway to obviate the statutory 180-day filing deadline” in section 1324b.

Response: The Department is satisfied that the explanation provided in the preamble and acknowledged by the commenters—that those equitable modifications of filing deadlines would be “sparingly applied”—is sufficient. Because the Department will make exceptions only rarely, the Department does not agree that this proposed change creates the level of uncertainty and lack of finality that outweighs the need for flexibility in rare circumstances, such as where the charging party’s untimely filing was due to circumstances beyond the charging party’s control. As noted in the response to the previous comment, these principles are well-established in relevant administrative decisions.

Investigation

Issue: Some commenters claim that § 44.302 would substantially broaden the Special Counsel’s investigatory powers without a legal basis and in a way that would raise constitutional concerns under the Fourth Amendment, all without sufficient explanation as to the reasons. These commenters also cite to *In re Investigation of Charge of Estela Reyes-Martinon v. Swift & Co.*, 9 OCAHO no. 1058 (2000), to assert that the Special Counsel lacks the investigatory power under section 1324b to seek written interrogatory answers or to require that respondents create evidence not yet in existence. Another commenter claims that this new “broad, sweeping authority” would allow the Special Counsel to “subpoena anything, in any format, at any time.” For example, this commenter asks whether this would mean that “employers must now keep Forms I-9 for an indefinite period of time,” a requirement that in this commenter’s view could violate other federal and state laws.

Response: The Department disagrees with these comments and is adopting the language as proposed with no changes. First, neither the law nor the regulations on their face violate the Fourth Amendment. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (Facial challenges are “the most difficult . . . to mount successfully.”); *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2450 (2015) (“[C]laims for facial relief under the Fourth Amendment are unlikely to succeed when there is substantial ambiguity as to what conduct a statute authorizes.”); *Sibron v. New York*, 392 U.S. 40, 59 (1968) (“The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of an individual case.”). If a person or entity believes that in a particular case the Department is applying the statute or regulations in an unconstitutional manner, they may bring an as-applied constitutional challenge.

Second, the Department agrees that while a person or entity being investigated must respond to requests for information and also respond to requests for documents that already exist, the person or entity is not required to otherwise create new documents or to provide documents in a format that does not exist at the time of the subpoena. For example, if an employer does not make and retain copies of Form I-9 documentation, the employer is not obligated to provide copies of Form I-9 documentation, nor should it ask its employees to provide a copy or present their documentation anew to make copies. However, the Department disagrees that the proposed revisions in the NPRM require otherwise. Moreover, Department regulations have allowed the Special Counsel to propound interrogatories since originally promulgated in 1987, which is consistent with the Special Counsel's authority to have, "in accordance with regulations of the Attorney General[,] . . . reasonable access to examine evidence of any person or entity being investigated." 8 U.S.C. 1324b(f)(2).

The Department also disagrees with the comment that the *Swift* decision precludes the Special Counsel from propounding interrogatories. Although these commenters are correct that the ALJ in *Swift* determined that OCAHO lacked authority to order a party to respond to interrogatories propounded by the Special Counsel, 9 OCAHO no. 1058 at 14, the ALJ also recognized that the Special Counsel might still have the authority to propound interrogatories, *id.* at 8, 13, and also acknowledged that other OCAHO ALJs had ordered respondents to comply with subpoenas seeking both documents and answers to interrogatories. *Id.* at 12-13. The ALJ in *Swift* further acknowledged but declined to follow a prior case, *In re Investigation of Strano Farms*, in which a different ALJ held that "the fact that the evidence sought in the subpoena at issue does not currently exist in documentary form does not invalidate the subpoena in question." 3 OCAHO no. 521, 1217, 1223 (1993). Because *Swift* concerned OCAHO authority, not the

Special Counsel's authority, and in light of the conflict in case law, the Department does not believe *Swift* is determinative on this issue. The Department is relying on the broad authority under 8 U.S.C. 1324b(f)(2) and OCAHO case law that supports the Special Counsel's ability to propound interrogatories and, when necessary, seek a subpoena to obtain answers. This is in accord with the Special Counsel's current practice of requesting both documents and information during investigations and obtaining a subpoena from OCAHO as necessary to ensure that the Special Counsel receives needed information and documents.

Third, regarding concerns on Form I-9 retention requirements, while an employer being investigated is obligated to maintain potentially relevant documents, which would include Forms I-9, other employers are subject only to the general retention requirements in section 1324a and any other federal, state or local record retention obligations (including any preservation requirements under other investigations/suits).

Issue: One commenter questions why the Department has sought to codify a respondent's preservation obligations in § 44.302(d), asserting that the proposed document retention provisions "are overly vague, confusing, and unnecessary." In particular, the commenter said that "[t]he proposal gives little guidance to employers concerning how they are to determine what evidence is 'potentially relevant' to an allegation or how to apply that 'potentially relevant' formulation."

Response: The Department disagrees with this commenter's suggested conclusions but is providing here additional explanation for the proposals. OCAHO has acknowledged that an employer is on notice of its obligation to preserve potentially relevant evidence when it receives notice of a charge filed against it under section 1324b. See *Sefic v. Marconi*, 9 OCAHO no. 1123, 13-14 (2007). In *Sefic*, OCAHO cited to *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355,

372 (1977), for the proposition that “unlike a litigant in a private suit who may get notice only when a complaint is filed, a Title VII defendant gets notice of the possibility of a suit when the charge is served.” *Sefic*, 9 OCAHO no. 1123 at 14. Paragraph (d) reflects this obligation. Moreover, the paragraph applies the preservation obligation to any alleged unfair immigration-related employment practice, meaning that the respondent has notice of the alleged violation(s) that the Special Counsel is investigating.

What constitutes “potentially relevant” evidence will vary depending upon the scope of the Special Counsel’s investigation and the evidence the employer has. In the context of an investigation by the Special Counsel, potentially relevant evidence will often include evidence relating to a person or entity’s recruiting, hiring, employment eligibility verification, and firing policies and practices. As with other types of employment discrimination claims, this may commonly include job applications, personnel records, a person or entity’s policies, and applicant flow information. Potentially relevant evidence under section 1324b will also include Forms I-9 along with any attachments, and E-Verify information. The Department notes that these examples are merely illustrative and by no means reflect the universe of what can be considered potentially relevant to an investigation by the Special Counsel. After considering the public comments, the Department is adopting this paragraph as it was proposed.

Authority to File OCAHO Complaints

Issue: Several commenters disagree with the proposed revision to § 44.303(d) regarding the timeframe for the Special Counsel to file a charged-based complaint with OCAHO. One of these commenters raises a concern that the Department is attempting to extend the applicable statute of limitations for the Special Counsel to file a complaint, rather than clarifying existing statutory limitations. This commenter believes this proposed revision will cause investigations

under this law to go “in perpetuity” and that the timeframe to file a complaint would be “excessive and unreasonable.” The commenter further believes this change will promote abusive and costly litigation and asks the Department to reconsider. A different commenter disagrees with the Department’s interpretation of the statutory language, reading the statute to limit the Special Counsel to filing a complaint by the end of the additional 90-day period during which the Special Counsel continues to have the right to investigate the charge and file a complaint. Another commenter states that this proposed revision is “extremely burdensome and disruptive to employers.” A different commenter states that “this puts employers in the position of having to potentially wait years to know whether a claim will be pursued.”

Response: The Department declines to make any changes to § 44.303(d) as proposed because the proposed revision makes no change to the applicable statutory time limits for charge-based complaints filed by the Special Counsel and is consistent with case law under both this law and a similar provision in Title VII. *See, e.g., United States v. Agripac, Inc.*, 8 OCAHO no. 1028, 399, 404 (1999); *United States v. Gen. Dynamics Corp.*, 3 OCAHO no. 517, 1121, 1156-57 (1993); *Occidental Life Ins. Co. of Calif. v. EEOC*, 432 U.S. 355, 361 (1977). As noted in the NPRM, the proposed revisions simply clarify that the Special Counsel is not bound by the statutory time limits for filing a complaint that are applicable to private actions. Moreover, the Department does not anticipate any significant changes to the speed with which it handles its investigations, and any costs that employers incur as a result of protracted litigation exist regardless of this proposed revision. For the reasons discussed in the NPRM, the Department believes this proposed revision is appropriate.

Issue: A number of comments address the proposed revision to § 44.304(b) regarding the timeframe for the Special Counsel to file a complaint with OCAHO based on an investigation

opened at the Special Counsel’s initiative. One commenter expresses support for the proposed revision, stating that “[i]t is in the interest of all parties—employers, employees, and OSC—if this filing deadline is removed so that OSC can thoroughly and accurately investigate a case before formally filing a case against an employer.” This commenter also states that “nothing in the Immigration and Nationality Act . . . provides for a filing deadline for these cases” and “[t]he [EEOC], a sister federal agency that protects against employment discrimination, has no similar filing deadline.”

Several commenters are critical of the proposed revision. Some commenters believe “[t]he Special Counsel’s time to bring a complaint and the scope of that complaint should be consistent with Congress’ clear directive in Section 1324b(d)(3).” These commenters appear to believe that because the statute lays out a clear timeframe for filing charges, there should be a comparable limit on the timeframe imposed on the Special Counsel for filing a complaint. One commenter disagrees with the Department’s reading of the statute, insisting that it requires the Special Counsel to file a complaint within 180 days of the discriminatory act. Another commenter argues that the NPRM inappropriately relies on *Agripac, Inc.*, 8 OCAHO no. 1028, and *General Dynamics Corp.*, 3 OCAHO no. 517, for the proposition that “the statute contains no time limits for an independent investigation.” This commenter similarly dismisses the Department’s reliance on *Occidental Life Insurance*, 432 U.S. 355. Other commenters point to the original regulatory text as support for why the Department cannot revise that regulatory text to align more closely with the statutory text.

Response: The Department declines to make any change to § 44.304(b) as proposed. As discussed in the NPRM, the most reasonable application of 8 U.S.C. 1324b(d)(3), which specifies that “[n]o complaint may be filed respecting any unfair immigration-related

employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel,” is that the Special Counsel may not file a complaint unless the Special Counsel opened an investigation on the Special Counsel’s own initiative pursuant to 8 U.S.C. 1324b(d)(1) within 180 days of the last known act of discrimination, as the opening of the Special Counsel’s investigation is the nearest equivalent to the filing of a charge. This reading of the statute is also supported by case law. *See United States v. Fairfield Jersey, Inc.*, 9 OCAHO no. 1069, 5 (2001) (acknowledging the absence of a statutory time limitation for the filing of a complaint arising out of an independent investigation). Furthermore, in the NPRM the Department cited to *Agripac*, *General Dynamics Corporation*, and *Occidental Life Insurance* when discussing the Special Counsel’s time limits for filing a *charge-based* complaint, not—as one commenter suggests—when discussing the Special Counsel’s time limits for filing a complaint based on an independent investigation that the Special Counsel opened pursuant to 8 U.S.C. 1324b(d)(1). The Department agrees with the commenter that *Agripac* was not based on an independent investigation opened pursuant to 8 U.S.C. 1324b(d)(1). The Department cited to *Agripac* and *General Dynamics Corporation* in the NPRM for the broader proposition that the Special Counsel is not bound by the statutory time limits that are applicable to individuals filing private actions, and cited to *Occidental Life Insurance* as instructive given the similar charge-filing procedures and virtually identical timetables found in Title VII. The Department has considered the view expressed by this commenter. However, the Department is not changing its long-held interpretation of 8 U.S.C. 1324(d)(3), but rather, is conforming the regulatory text to more closely align with the statutory text.

Issue: Some commenters object more broadly to the clarified time limitations for the Department to file a complaint, based on a view that the timelines are contrary to public policy.

In particular, these commenters state that a longer deadline for the Department to file complaints would interfere with the availability of witnesses, employers' ability to preserve evidence, and witnesses' ability to recall the events in question, and would burden employers by requiring a longer document retention period. A number of commenters also object to the Department's reliance on a five-year limitations period under 28 U.S.C. 2462 for bringing actions to impose civil penalties.

Response: The Department will make no changes to its clarified time limitations for filing a complaint in either § 44.303(d) or § 44.304(b) and is adopting these subsections as proposed with no changes. These timelines are consistent with the statute and OCAHO case law cited in the NPRM and discussed in the prior comment response above. In addition, section 1324b is aimed at stopping discriminatory practices and providing redress for victims of discrimination. In the Department's view, public policy would not be served by imposing time limitations on this remedial statute that are unsupported by the statutory language. Furthermore, any delays or costs associated with protracted litigation exists independent of this proposed revision. Finally, the Department's reliance on 28 U.S.C. 2462 for imposing a time limit for the Special Counsel to bring an action involving civil penalties is not new, but rather, reflects the Department's long-standing position regarding the outer time limits imposed on the Special Counsel. As discussed in the NPRM, similar to the EEOC, the Special Counsel is still bound by equitable limits on the filing of a complaint. *See EEOC v. Propak Logistics, Inc.*, 746 F.3d 145 (4th Cir. 2014).

Other Comments

Issue: Two commenters express support for reforming U.S. immigration laws and in particular reforming immigration laws for employment-based visas. One commenter raised concerns about the wait times for beneficiaries of employment-based visas.

Response: These comments fall outside the scope of this rule. The proposed revisions implemented by this final rule do not change U.S. immigration laws or the employment-based visa process, including wait times. The proposed revisions implement existing law prohibiting unlawful employment discrimination based on citizenship status or national origin.

Issue: One commenter raises concerns about the Form I-9 employment eligibility verification process and asked that “everyone, federal agencies, employers and employees, lawyers, Congress, etc. should together establish a timely efficient effective employment verification process, or scrap it.”

Response: USCIS, within DHS, publishes the Form I-9 and accompanying guidance and determines which documents are acceptable for employment eligibility verification, pursuant to the requirements of 8 U.S.C. 1324a. This issue falls outside the scope of this rule and the Department refers the commenter to USCIS for more information on this issue.

Issue: One commenter seeks guidance on whether an employer may refuse to accept for employment eligibility verification purposes a driver’s license or identification card issued by a state that does not have “citizenship requirements.”

Response: USCIS publishes the Form I-9 and accompanying guidance and determines which documents are acceptable for employment eligibility verification. This issue falls outside the scope of this rule and the Department refers the commenter to USCIS for more information on this issue.

Issue: One commenter requests guidance on the issue of states recognizing other states' driver's licenses and "certifications" as "valid eligibility" for individuals to obtain licenses in a state where a particular immigration status may otherwise disqualify that individual.

Response: This issue falls outside the scope of this rule and the Department refers the commenter to USCIS for more information on this issue.

Regulatory Procedures

Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

The rule has been drafted and reviewed in accordance with Executive Order 12866 (Sept. 30, 1993), and Executive Order 13563 (Jan. 18, 2011). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits (while recognizing that some benefits and costs are difficult to quantify), reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, the Department must determine whether a regulatory action is "significant" and, therefore, subject to the requirements of the Executive Order and Office of Management and Budget (OMB) review. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as any regulatory action that is likely to result in a rule "that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2)

Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The Department has determined that the rule is not an economically significant regulatory action under section 3(f)(1) of Executive Order 12866 because the Department estimates that its annual economic impact will be a one-time, first-year-only cost of approximately \$28.0 million—far less than \$100 million. The Department has quantified and monetized the costs of the rule over a period of 10 years (2017 through 2026) to ensure that its estimate captures all major benefits and costs, but has determined that all quantifiable costs will be incurred only during the first year after the regulation is implemented. Because the Department was unable to quantify the benefits of the rule due to data limitations, the benefits are described qualitatively.

The Department considered the following factors when measuring the rule’s impact: (a) employers familiarizing themselves with the rule, (b) employers reviewing and revising their employment eligibility verification policies, and (c) employers and employees viewing training webinars. The largest cost is the cumulative costs that employers would have to incur to review and revise their employment eligibility verification policies, which the Department estimates to be \$17,858,003. The next largest cost is the cost employers would have to incur to familiarize themselves with the rule, which the Department estimates to be \$10,132,200.

The economic analysis presented below covers all employers with four or more employees, consistent with the statute’s requirement that a “person or entity” have more than three employees to fall within the Special Counsel’s jurisdiction for citizenship status and

national origin discrimination in hiring, firing, and recruitment or referral for a fee. 8 U.S.C. 1324(a)(2).

In the following sections, the Department first presents a summary of the public comments received on the economic analysis, the Department's responses to these comments, and changes made to the estimation of the costs of this rule in response to those comments. Next, the Department presents a subject-by-subject analysis of the costs of the rule. The Department then presents the undiscounted 10-year total cost (\$28.0 million) and a discussion of the expected benefits of the rule. Because the costs are incurred entirely in the first year, they are not discounted.

The Department did not identify any transfer payments associated with the provisions of the rule. Transfer payments, as defined by OMB Circular A-4, are "monetary payments from one group to another that do not affect total resources available to society." OMB Circular A-4 at 38 (Sept. 17, 2003). Transfer payments do not result in additional costs or benefits to society.

In the subject-by-subject analysis, the Department presents the labor and other costs for each provision of the rule. Exhibit 1 displays the labor categories that are expected to experience an increase in the level of effort (workload) due to the rule. To estimate the cost, the Department multiplied each labor category's hourly compensation rate by the level of effort. The Department used wage rates from the Mean Hourly Wage Rate calculated by the Bureau of Labor Statistics.¹ Wage rates are adjusted using a loaded wage factor to reflect total compensation, which includes health and retirement benefits. The loaded wage factor was calculated as the ratio of average total compensation to average wages in 2015, which resulted in

¹ Bureau of Labor Statistics, December 2015 National Occupational Employment and Wage Estimates: United States (Mar. 10, 2016), http://www.bls.gov/schedule/archives/ecec_nr.htm#2015.

1.44 for the private sector.² The Department then multiplied the loaded wage factor by each labor category's wage rate to calculate an hourly compensation rate.

Exhibit 1: Calculation of Hourly Compensation Rates			
Position	Average hourly wage	Loaded wage factor	Hourly compensation rate
	a	b	c = a × b
Human Resources Manager	\$56.29	1.44	\$81.0576
Attorney	\$65.51		\$94.3344

1. Public Comments on Regulatory Assessment and Department Responses

This section discusses public comments to the economic analysis that accompanied the proposed rule, the Department's responses to those comments, and changes made to the estimation of costs of this rule in response to those comments.

The Department received 24 comments related to the economic analysis accompanying the proposed rule. However, 18 of these comments had similar, although not identical, text. The remaining six comments presented unique input on the economic analysis.

a. Comments Regarding the Number of Employers Affected by the Rule

Many commenters disagreed with the methodology included in the economic analysis for estimating the number of impacted employers. The commenters indicated that the Department has underestimated the number of impacted employers because it used a basis of the number of organizational members of the Council for Global Immigration (CFG I) and the Society for

² The Department calculated average total compensation by taking the average of the cost of total compensation for all workers in December, September, June, and March of 2015 ($(\$31.70 + \$31.53 + \$31.39 + \$31.65) / 4 = \$31.57$), and calculated average wages by taking the average of the cost of wages and salaries for those employees in each of those four months ($(\$22.14 + \$21.98 + \$21.82 + \$21.94) / 4 = \$21.97$). See data retrieved from the BLS data retrieval tool, Private Industry Total Compensation for All Occupations and Private Industry Wages and Salaries for All Occupations, <http://data.bls.gov/cgi-bin/surveymost?cm> .http://www.bls.gov/schedule/archives/ecec_nr.htm.) The Department then calculated the loaded wage factor by taking the ratio of average total compensation to average total wages ($\$31.57 / \$21.97 = 1.44$).

Human Resource Management (SHRM), totaling 56,685 firms. The commenters suggested using data from the U.S. Census of Business, compiled by the Office of Advocacy of the U.S. Small Business Administration (SBA), which shows that there were 2,182,169 firms with more than four employees in 2012, the most recent year for which the data is available.

Relying on 2012 U.S. Census Bureau data, one commenter indicated that 3,916,991 employers with at least five employees should be included in the analysis. The commenter stated that it is not reasonable to limit the analysis to organizations with developed human resources practices because, regardless of whether an organization has developed human resources practices, it can be held accountable for unfair immigration-related unfair employment practices.

One commenter asserted that the number of organizational members of CFGI and SHRM should not be the basis for the number of impacted employers because those associations do not represent the entire universe of employers with developed human resource practices, which is equal to approximately 2 million employers.

For purposes of calculating rule familiarization costs, one commenter stated that firms with fewer than four employees should be included because these firms will have to familiarize themselves with the rule to figure out its scope and how changes to their business would impact the applicability of the rule.

For purposes of calculating the costs to review and revise existing policies, procedures, and management training materials, one commenter indicated that either the SBA data on covered employers should have been used (*i.e.*, 2,182,169 firms) or the Department should have taken the readily available information from USCIS about employers using the E-Verify system (more than 600,000 employers) to estimate better the number of employers likely to have some formal employment eligibility verification policy.

The Department does not agree that all employers covered by the law should be included to estimate the costs of the rule, nor does the Department agree that all E-Verify employers or all employers with fewer than four employees should be included. The revisions to the current regulations are meant to clarify obligations that employers already have under the statute and current regulations, and do not impose new burdens for compliance.

The number of employers that will be impacted by the revisions to the current regulations is limited to those employers that have sufficiently detailed policies for avoiding discrimination under section 1324b such that the revisions will require them to review and update their policies. Many E-Verify and other employers may have basic policies in place for the proper administration of the Form I-9 and E-Verify processes, and many employers may have anti-discrimination policies concerning hiring and firing. In the Department's experience investigating discrimination claims, however, and in the Department's experience educating employers through its hotline and other training opportunities, few employers already have policies in place governing how to avoid the types of discrimination covered by section 1324b. In the Department's experience, even fewer employers already have policies that describe information about the Special Counsel's complaint-filing deadlines, charge-filing procedures, and definitions of statutory terms, as this type of information does not typically relate to the duties of human resources professionals, which are at the heart of the revisions.

Accordingly, the Department estimates that very few employers—including E-Verify employers—have employment policies so detailed that they will require revisions to their policies. Within the small group of employers that have detailed discrimination policies that describe employer obligations under section 1324b, a smaller number of employers may include the name of the office that enforces this statute in their written policies. Similarly, in the

Department's experience, very small employers—those with fewer than four employees—are least likely to have developed policies relating to discrimination under section 1324b in part because their size makes it much less likely that they employ a full-time human resources professional dedicated to developing and implementing policies, but also because section 1324b clearly limits jurisdiction for discrimination in hiring, firing, and recruitment or referral for a fee to employers with four or more employees.

The Department also disagrees that the appropriate number of employers is the number of E-Verify users because, in the Department's experience regularly educating and working with these employers, E-Verify employers are not necessarily more likely to have detailed written policies relating to section 1324b that will require any updates based on the revisions made to the existing regulations.

b. Comments Regarding the Methodology for Estimating the Number of Organizations Represented Among CFGI and SHRM Membership

To determine the number of employers affected by the rule, the analysis assumed that the same ratio of organizational members to individual members existed for CFGI and SHRM. A commenter stated that it is not accurate to assume that the ratio of CFGI individual contacts to organizational members is the same as the ratio of SHRM individual members to the number of organizations that employ them. The commenter asserted that the more accurate estimate of the number of organizations represented in SHRM's membership is 125,000, rather than 56,455 organizations.

The Department will adopt the number of estimated organizational members that SHRM and CFGI provided, which is 125,000. The Department believes that the number of organizational members of SHRM and CFGI provides the best estimate of the number of employers likely to have detailed written policies discussing employer obligations under section

1324b. The Department reasonably expects that most of the limited number of employers that already have policies discussing employer obligations under section 1324b will be unlikely to have to make any revisions to those policies. The reason for this is that the revisions do not impose any new compliance obligations.

The Department requested membership information from SHRM and CFGI before the publication of the NPRM and appreciates receiving that information now.

c. Comments Regarding the “Upfront, One-time Cost” Assumption

A commenter expressed disagreement with the assumption that the rule imposes an “upfront, one-time cost.” Instead, the commenter indicated that in addition to the costs of initial implementation, employers will incur legal costs and training costs every time they are presented with a unique situation that is not covered by the employer’s general policy against discrimination, *e.g.*, any acknowledgment of citizenship status during the hiring process.

The Department does not agree that there will be ongoing training costs because the costs described by the commenter relate not to burdens that are imposed by the revisions to the current regulations, but instead relate to the overall burden of compliance. As noted, employers have the same obligations under the statute and current regulations not to discriminate or retaliate.

d. Comments Regarding the Estimated Costs for Implementation of the Rule

A commenter stated that the Department significantly underestimates the number of employees who will be involved in reading, reviewing, and making changes to policies by assuming that only one human resources manager per employer will do so. The commenter asserted that it is almost certain that more people will be involved in making these changes, including supervisors and, in many cases, in-house and outside counsel. Additionally, the commenter asserted that after changes are made, all employees involved in the hiring process

will have to be brought up to speed, which will necessitate additional training. The commenter also asserted that the Department underestimates the amount of time required to review the rule, revise policies, and update staff on the new regulation and policies. In particular, this commenter pointed to the SHRM Knowledge Center five-step process for developing human resources policies as instructive for assessing the appropriate amount of time needed for an entity to revise current policies based on the regulatory changes.

The Department does not agree that, for most employers, more than one staff member needs to be involved in reading, reviewing, and making changes to policies as a result of the rule. Although employers may have different experiences in implementing HR updates, the Department estimates, based on its experience with entities covered by this law, that on average, only one individual will be involved in making the few if any changes. Instead, it appears that the commenters are concerned about reviewing and educating themselves about existing obligations to prevent discrimination, which relates to compliance with the law in general but not the changes in the rule. For example, employers are already prohibited from discriminating in hiring, firing, and recruiting or referring for a fee based on citizenship status and national origin. Also, employers already must allow each employee to choose which valid documentation to provide for employment eligibility verification purposes, regardless of citizenship status or national origin. If an employer decides to create a new policy explaining those obligations and train its staff accordingly, these costs are not tied to changes promulgated in this rule but instead to obligations that have existed since at least 1996 and in some cases 1986.

The Department does not agree that additional training is required for the changes promulgated through this rule because relatively few employers have sufficiently detailed policies that would be impacted by revisions to the current regulations.

Although the Department recognizes that employers may have different practices, the Department does not believe, based on its experience with covered entities, that, in general, more than one-and-a-half hours is required to review the new rule and update policies that require revisions. In the Department's view, the five-step process cited by one commenter for *developing* human resources policies would not apply in this context. The first step in the five-step process, which is "identifying the need for a policy," is inapplicable because an entity should be assessing the need for a policy based not on these regulatory changes but based on the entity's legal obligations required by statute. Likewise, the second step, "determine policy content," would flow not from these regulatory revisions but from the statute. The Department similarly disagrees that steps three and four—obtaining stakeholder support and updating staff about the regulatory changes—should be factored into this calculation, as staff seeking to comply with their statutory and current regulatory obligations would not need to be updated on these types of regulatory revisions and, as discussed throughout this rule, the revisions to the regulations create no new obligations. While the fifth step, which involves updating and revising the policy, may apply in some instances, the Department has accounted for this in its assessment of one-and-a-half hours for reviewing and revising policies.

e. Comments Regarding the Estimated Cost for Training

A commenter stated that the estimated training costs are based on untenable assumptions. Specifically, the commenter expressed disagreement that only 347 people would receive the training. Instead, the commenter indicated that it should be assumed that one employee for each of the affected employers would take the one-hour training. Also, the commenter stated that the training cost component will not be a one-time cost item but, instead, will be a recurring cost as new or replacement managers are hired. Additionally, the formation of new employer

companies will trigger future additional training costs. Similarly, another commenter stated that the Department fails to account for the significant staff time that will be required to ensure that those involved in the hiring process are aware of the new regulation and policies and, therefore, underestimates the training cost of this rule “by many orders of magnitude.”

The Department does not agree with the assertions by these commenters and has already addressed three of these four issues above in responses to other comments. In response to concerns about training costs to new employers, the Department also does not agree that the formation of new employers requires additional costs. When an employer is formed, the employer should learn of its obligations under various employment, labor, and other laws, but the changes promulgated through this rule likely have no effect on new employers because they do not alter employers’ core obligations to comply with section 1324b, and any training on these obligations would have occurred anyway – regardless of this rule’s changes to the current regulations. For example, learning about the name of the office that enforces section 1324b is less critical than an employer learning about its core statutory obligations not to discriminate. A new employer would have no need to revise any policies to reflect the narrow changes in this rule because the employer could simply prepare a policy that incorporates longstanding obligations not to discriminate unlawfully based on citizenship status or national origin, and not to retaliate. In response to concerns that the training cost is a recurring cost as new or replacement managers are hired, the Department does not agree. For the same reasons that a new employer would not incur costs flowing from the changes to the regulations, a new or replacement manager would need training on the employer’s core obligations to comply with section 1324b and not training to understand the changes between the previous and current regulations.

f. Comments Regarding Specific Costs Not Accounted for in the Economic Analysis

A commenter stated that the Department does not account for (1) increases in legal fees and penalties for defending discrimination claims due to the new regulation, or (2) additional costs for document retention employers will incur due to changes in the statute of limitations for the Special Counsel to file a charge.

The Department does not agree that there is sufficient basis for the assertion that the revisions will cause an increase in legal fees and penalties. The revisions make no change to the applicable statutory time limits for charge-based complaints filed by the Special Counsel and are consistent with case law under both this law and Title VII. Moreover, the Department does not anticipate any significant changes to the speed with which it handles its investigations, and any costs that employers incur as a result of protracted litigation exist regardless of this revision.

Moreover, the Department currently extends investigation times through stipulations with respondents and, when needed, by seeking leave from the Office of the Chief Administrative Hearing Officer (OCAHO). Finally, the Special Counsel has filed nine lawsuits in the last five years combined and has entered into a total of 100 settlements during that same period. Thus, a relatively small number of employers are affected by litigation costs, and these employers have no basis to expect that the revisions would increase the level of litigation. If anything, the revisions would better assist employers in understanding the case law that is reflected in the revisions, helping them to comply with the law and avoid litigation altogether. Moreover, the Department makes many free resources available to employers to assist them with compliance, including (1) a public website containing an employer tab with over 20 employer guidance documents, a frequently asked questions section, free educational videos, and technical

assistance letters; (2) a toll-free employer hotline; and (3) free hardcopy educational materials distributed in many forums.

Employers investigated by the Special Counsel already have document retention requirements, and the revisions do not change those requirements. Those requirements end once a matter is resolved, after the conclusion of any monitoring period, which ordinarily takes two to three years. Employers that are not subject to an investigation by the Special Counsel would continue to operate under their existing retention policies. The commenters did not provide estimates for these additional retention requirements.

g. Other General Comments on the Economic Analysis

A few commenters stated that the NPRM does not satisfy the requirements of the Regulatory Flexibility Act or that it underestimates the impacts of the rule on employers. A commenter stated that the rule exceeds the \$100 million threshold under the Regulatory Flexibility Act requirements, arguing that the rule should be further analyzed by the Office of Information and Regulatory Affairs within OMB. The commenter, however, did not provide an explanation for how the commenter arrived at this estimated amount.

Accordingly, the Department is unable to analyze the specifics of the commenter's comment and therefore declines to agree with this comment and instead relies upon its own analysis of the economic impact of these revisions, and as discussed in responses provided above to other comments.

2. Subject-by-Subject Analysis

a. Employers Familiarize Themselves with the Rule

During the first year of the rule, employers with a developed human resources practice will need to read and review the rule to learn about the new requirements. The Department

determined that no costs will be incurred by employers to familiarize themselves with the rule in years two through ten because (1) the cost for an existing employer to familiarize itself with the rule if it delays doing so until a subsequent year is already incorporated into the first-year cost calculations; and (2) for employers that are newly created in years two through ten, the cost of familiarization is the same as exists under the current regulations and, therefore, there is no incremental cost.

Employers will incur labor costs to familiarize themselves with the new rule. To estimate the labor cost of this provision, the Department first estimated the number of employers that will need to familiarize themselves with the rule by relying on the number of organizational members in CFGI and SHRM.³ The Department used the number of organizational members in these two organizations as a proxy for the number of employers with a developed human resources practice that can be expected to institutionalize the regulatory changes.

The Department then multiplied the estimated number of employers by the assumed number of human resources managers per employer, the time required to read and review the new rule, and the hourly compensation rate. The Department estimated this one-time cost to be \$10,132,200.⁴

b. Employers Review and Revise Employment Eligibility Verification Policies

The rule will require some employers to revise their employment eligibility verification policies. Although under 8 U.S.C. 1324a, all U.S. employers must properly complete a Form I-9 for each individual they hire for employment in the United States to verify the individual's

³ The Department obtained the estimated number of organizational members in CFGI and SHRM, 125,000, directly from these two organizations in their comment in response to the economic analysis accompanying the proposed rule. The estimated total number of employers is 125,000.

⁴ The Department estimated the cost of this review by multiplying the estimated number of employers (125,000) by the number of HR managers per employer (1), the time needed to read and review the rule (1 hour), and the hourly compensation rate (\$81.0576). This calculation yields a labor cost of \$10,132,200.

identity and employment authorization, only a subset of employers has detailed written policies specifically addressing compliance with section 1324b. The Department assumed that these employers would be in the practice of saving their policies in an electronic format that can be readily modified. For the policy revisions, employers will complete a simple “search-and-replace” to update the agency’s name and possibly replace the term “documentation abuse(s)” with “unfair documentary practice(s).”

Only a very limited subset of those employers that have detailed written employment eligibility verification policies will need to make additional modifications to their policies. The Department estimated costs only for those employers that have written employment eligibility verification policies and that will review their policies and make changes as needed. The time involved will depend on the changes employers need to make, whether those changes need to be made to one or more documents or resource materials, and how many sections of the policy will need to be modified.

Employers with policies for verifying employment eligibility (and possibly employers with hiring or termination policies, even if they lack policies for verifying employment eligibility) might conduct a front-to-back review of their policies to determine whether any additional changes are needed.

These changes and reviews will represent an upfront, one-time cost to employers. The Department estimates this cost as the sum of the cost of revising the policies by making word replacements; the cost, for some employers, of making additional changes beyond word replacements; and the cost of conducting a front-to-back review of the employment eligibility verification policies.

To estimate the labor cost for making word replacements to the employment eligibility verification policies, the Department first estimated the number of employers that will make these revisions because of the rule by relying on the number of organizational members in SHRM and CFGI. The Department then multiplied the estimated number of employers by the assumed number of human resources managers per employer, the time required to make the revisions, and the hourly compensation rate.⁵ This calculation yields \$2,533,050 in labor costs related to revising employment eligibility verification policies in the first year of the rule. Dollar values presented in this section may not sum because of rounding error.

To estimate the additional cost to those employers making changes beyond word replacements in the first year of the rule, the Department assumed that 5 percent of employers (*i.e.*, the number of organizational members in CFGI and SHRM) will make these changes. The Department then multiplied the number of employers that will make these additional changes by the assumed number of human resources managers per employer, the time required to make the changes, and the hourly compensation rate. This calculation yields \$126,653 in labor costs in the first year of the rule.⁶

To estimate the cost of conducting a front-to-back review of the policies for verifying employment eligibility (or hiring and termination policies), the Department multiplied the number of employers (*i.e.*, the number of organizational members in CFGI and SHRM) by the

⁵ To estimate the cost of making revisions, the Department multiplied the estimated number of employers (125,000) by the assumed number of human resources managers per employer (1), the hourly compensation rate (\$81.0576), and the time required to make the revisions (0.25 hours). This calculation results in a cost of \$2,533,050.

⁶ To estimate the cost of making changes beyond word replacements, the Department first calculated the number of employers that will make these changes. The Department obtained the number of employers that will make these additional changes by multiplying the number of affected employers (125,000) by the assumed percentage of employers that will make these additional changes (5%). This calculation yields the number 6,250. The Department then multiplied that number of employers (6,250) by the number of human resources managers per employer (1), the hourly compensation rate (\$81.0576), and the time required to make the changes (0.25 hours). This calculation results in a cost of \$126,653.

number of human resources managers per employer, the time required for a review, and the hourly compensation rate. This calculation yields \$15,198,300 in labor costs in the first year of the rule.⁷

In total, the one-time costs to employers to revise policies for verifying employment eligibility by making word replacements, to make additional changes beyond word replacements for some employers, and to conduct a front-to-back review of those policies, are estimated to be \$17,858,003 (\$2,533,050 + \$126,653 + \$15,198,300) during the first year of rule implementation.

c. Employers and Employees View Training Webinars

To assist employers, employees, attorneys, and advocates in understanding the changes resulting from the rule, during the first year of implementation, as a part of the Department's ongoing educational webinar series, the Department expects to schedule three live, optional employer training webinars per month and one live, optional advocate/employee training webinar per month. These live one-hour training webinars will cover the full spectrum of employer obligations and employee rights under the statute. The Department also expects to create three one-hour recorded webinars: one for employers and their representatives and two for employees and their representatives (one in English and one in Spanish). All of these resources will be accessible, including to persons with disabilities, online at no cost to the public including employers. They will be accessible remotely and will not require travel. The Department anticipates that participation will occur mostly through viewings of the one-hour recorded

⁷ To estimate the cost of reviewing the policies, the Department assumed, out of an abundance of caution, that all of the employers affiliated with CFGI or SHRM will dedicate one human resources manager to conduct a front-to-back review of their policies. Accordingly, the Department multiplied the number of employers (125,000) by the assumed number of human resources managers per employer (1), the hourly compensation rate (\$81.0576), and the time required to review the policies (1.5 hours). This calculation results in a cost of \$15,198,300.

webinars. The recorded training webinars developed to explain the post-rule regulatory and statutory obligations and rights will eventually replace the Department's existing live webinars. Therefore, the Department has calculated these costs for employers, employees, and their representatives to be incurred in the first year when learning about the changes, whether through a live or recorded training webinar. After that, newly-created employers will be viewing training webinars instead of (not in addition to) viewing current webinars, with no incremental costs incurred. Periodically, the Department may update the webinar content in light of legal and policy developments, and may publish supplemental educational materials for employer and employee audiences on its website, including in other languages.

To estimate the cost to employers of viewing training webinars, the Department summed the labor costs for those viewing live webinars and the labor costs for those viewing recorded webinars. To estimate the number of employers viewing the live webinars, the Department used statistics on the average number of employer participants in live webinars. To estimate the number of employers viewing a recorded webinar, the Department used data on the number of viewings of the Department's educational videos about employer obligations under 8 U.S.C. 1324b that are posted on YouTube. Both estimates assume a 15-percent increase in participation following the implementation of the rule.⁸ The Department multiplied the number of employers expected to view a webinar (represented by their human resources managers) by the hourly compensation rate, the time required to view a webinar, and the number of training webinars in

⁸ On average, 44.7 individuals participate in live webinars for employers. The Department assumed that there will be a 15-percent increase in the number of participants following the implementation of the rule. Thus, the Department estimated costs for seven employers (*i.e.*, 15 percent of the 44.7 individuals) related to viewing the live webinar. On average, 567 individuals have viewed each of the educational YouTube videos. Thus, the Department estimated costs for 85 employers (*i.e.*, 15 percent of the 567 individuals) related to viewing the recorded webinar.

the first year for both live and recorded webinars. The total one-time cost to employers for viewing live and recorded webinars is estimated to be \$27,316.⁹

To estimate the cost to employees of viewing live training webinars, the Department used existing statistics on the average participation of employees. To estimate the cost to employees of viewing recorded webinars, the Department used the employer-to-employee ratio of participation in the live webinars and applied it to the number of views of the Department's educational videos on the website www.YouTube.com. Both estimates assume a 5-percent increase in participation following the implementation of the rule.¹⁰ These estimates are based upon only the webinars recorded in English because the Department does not expect an increase in the number of views of the Spanish webinars following the implementation of the rule. In the Department's experience, in many cases the live Spanish webinars that have been offered have been canceled due to lack of attendees. In other cases, the Spanish webinars proceeded but with a turnout of fewer than ten participants, who are typically employees (identified as employees by the type of questions they ask or by their registrations with personal email addresses). The Department multiplied the number of employees expected to view webinars (represented by their attorneys) by the hourly compensation rate, the time required to view a webinar, and the number

⁹ The Department estimated the cost of viewing the live webinars by taking the product of the number of employer representatives (human resources managers) viewing the live webinar (7), the hourly compensation rate (\$81.0576), the number of webinars per year (36), and the time required to view the webinar (1 hour). This yielded a cost of \$20,427. The Department then estimated the cost of viewing the recorded webinars by taking the product of the number of employer representatives (HR managers) viewing the recorded webinars (85), the hourly compensation rate (\$81.0576), the number of webinars (1), and the time required to view the webinar (1 hour). This yielded a cost of \$6,890. The total cost of viewing webinars was estimated by taking the sum of the cost of viewing live webinars and the cost of viewing recorded webinars, to obtain a total cost of \$27,316.

¹⁰ On average, 12 individuals participate in live webinars for employees. The Department assumed that there will be a 5-percent increase in individuals following the implementation of the rule. Thus, the Department estimated costs for one employee (*i.e.*, 5 percent of the 12 individuals) related to viewing the live webinars. On average, 567 individuals viewed the educational YouTube videos. The Department assumed the same proportion of employees-to-employers viewing the live webinars ($0.268 = 12 / 44.7$) will view the recorded webinars. This number will translate to 152 employees or employee advocates viewing the educational YouTube videos. Thus, the Department estimated costs for 8 employees (*i.e.*, 5 percent of the 152 individuals) related to viewing the recorded webinar.

of training webinars in the first year for both live and recorded webinars. The Department estimates a total and aggregate one-time cost of \$1,887 for viewing live or recorded advocate/employee webinars.¹¹

Accordingly, the Department estimates the total one-time cost to employers and employees of viewing live and recorded webinars to be \$29,203 (\$27,316 + \$1,887).

d. Benefits of the Rule

The Department was not able to quantify the benefits of the rule due to data limitations, particularly the difficulties in calculating the amount of time employers will save from the rule. Several benefits to society will result, however, from the rule, including the following:

Helping employers understand the law more efficiently. The Department projects that the regulatory changes will reduce the time and effort necessary for employers to understand their statutory obligations by incorporating well-established administrative decisions, the Department's long-standing positions, and statutory amendments into the regulations.

Increasing public access to government services. The regulatory changes will streamline the charge-filing process for individuals alleging discrimination. For example, the criteria needed to satisfy the definition of a "charge" have been reduced, and members of the public can now file charges electronically.

Eliminating public confusion regarding two offices in the Federal Government with the same name. The regulatory changes will reflect the change in the name of the office responsible

¹¹ The Department estimated the cost of viewing live webinars by taking the product of the number of employee representatives (captured by the attorney occupational category) viewing the live webinar (1), the hourly compensation rate (\$94.3344), the number of webinars (12), and the time required to view the webinar (1 hour). This resulted in a cost of \$1,132. The Department then estimated the cost of viewing recorded webinars by taking the product of the number of employee representatives, assumed to be an attorney, viewing the recorded webinar (8), the hourly compensation rate (\$94.3344), the number of webinars (1), and the time required to view the webinar (1 hour). This resulted in a cost of \$755. The total cost of viewing webinars was estimated by taking the sum of the cost of viewing live webinars and the cost of viewing recorded webinars, to obtain a total cost of \$1,887.

for enforcing 8 U.S.C. 1324b from the Office of Special Counsel for Immigration-Related Unfair Employment Practices to the Immigrant and Employee Rights Section, thereby eliminating delays in processing submissions that currently occur due to confusion associated with having two Offices of Special Counsel in the Federal Government.¹²

Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)

The Regulatory Flexibility Act (RFA), 5 U.S.C. 603, and Executive Order 13272 (Aug. 13, 2002), require agencies to prepare a regulatory flexibility analysis of the anticipated impact of a regulation on small entities. The RFA provides that the agency is not required to prepare such an analysis if an agency head certifies, along with a statement providing the factual basis for such certification, that the regulation is not expected to have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). Based on the following analysis, the Attorney General certifies that this rule will not have a significant economic impact on a substantial number of small entities.

The Department's analysis focused on small businesses or nonprofits with 20 to 499 employees. The Department assumed that small businesses or nonprofits with fewer than 20 employees would not have a detailed written policy addressing compliance with 8 U.S.C. 1324b.

The Department assumed that, in total, 125,000 entities will be affected by the rule. Of those 125,000 affected entities, the Department estimated that 62,500 entities will be small employers.¹³ Dividing the affected population (62,500) by the total number of small businesses

¹² In addition to the Office of Special Counsel for Immigration-Related Unfair Employment Practices located in the Department's Civil Rights Division by 28 CFR 0.53, Congress has established an Office of Special Counsel charged with protecting employees, former employees, and applicants for employment from prohibited personnel practices, among other functions. *See* 5 U.S.C. 1211–1212.

¹³ According to the SHRM website, approximately 50 percent of the organization's members work in organizations with fewer than 500 employees. *See* SHRM, About the Society for Human Resource Management,

and non-profits (664,094), the Department estimates that the rule will impact 9.4 percent of small entities.¹⁴

The Department estimated the costs of (a) familiarizing staff with the new requirements in the rule, (b) reviewing and revising their employment eligibility verification policy, and (c) viewing a training webinar. The analysis focused on the first year of rule implementation when all costs of the rule are incurred. The Department estimated that the total one-year cost per small employer is \$324.¹⁵ The Department has determined that the yearly cost of \$324 will not have a significant economic impact on any of the affected small entities. Therefore, the Department has certified that the rule will not have a significant impact on a substantial number of small entities.

Paperwork Reduction Act

<http://www.shrm.org/about/pages/default.aspx>. Taking 50 percent of the total estimated number of members in SHRM and CFGI (125,000) results in 62,500 small entities.

¹⁴ The Department assumed that the total number of small businesses and non-profits is equal to the number of firms with 20 to 499 employees. Because the U.S. Census Bureau did not identify the number of firms with 20 to 499 employees in 2013, the most recent year for which data is available, the Department calculated the estimated number of firms with 20 to 499 employees in that year by calculating the number of establishments with 20 to 499 employees in 2013 and dividing it by the ratio of small establishments to small firms in 2012. To perform that calculation, the Department first determined the estimated number of firms with 20 to 99 employees in 2013 by (1) adding the number of establishments with 20 to 49 employees in 2013 and the number of establishments with 50 to 99 employees in 2013 ($652,075 + 221,192 = 873,267$); (2) dividing the number of establishments with 20 to 99 employees in 2012 by the number of firms with 20 to 99 employees in 2012 ($687,272 / 494,170 = 1.39076$); and (3) dividing the first number by the second ($873,267 / 1.39076 = 627,906$). The Department then determined the estimated number of firms with 100 to 499 employees in 2013 by (1) adding the number of establishments with 100 to 249 employees in 2013 and the number of establishments with 250 to 499 employees in 2013 ($124,411 + 31,843 = 156,254$); (2) dividing the number of establishments with 100 to 499 employees in 2012 by the number of firms with 100 to 499 employees in 2012 ($360,207 / 83,423 = 4.3178$); and (3) dividing the first number by the second ($156,254 / 4.3178 = 36,188$). Last, to determine the estimated number of firms with 20 to 499 employees in 2013, the Department added the estimated number of firms with 20 to 99 employees in 2013 and the estimated number of firms with 100 to 499 employees in 2013 ($627,906 + 36,188 = 664,094$). See U.S. Census Bureau, 2013 County Business Patterns (NAICS), <http://censtats.census.gov>; U.S. Census Bureau, 2012 Statistics of U.S. Businesses, Number of Firms, Number of Establishments, Employment, Annual Payroll, and Estimated Receipts by Enterprise Employment Size for the United States and States, Totals: 2012; http://www.census.gov/econ/susb/historical_data.html.

¹⁵ The Department estimated a cost of \$324 per small entity by taking the sum of the cost per small entity of each of the changes to the rule. This includes the following costs: familiarization with the rule (\$81), revising employment eligibility verification policies by making word replacements (\$20), making additional changes beyond word replacements (\$20), conducting a front-to-back review of the employment eligibility verification policies (\$122), and viewing the training webinar (\$81).

These regulations contain no information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 8 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this rule does not include any Federal mandate that may result in more than \$100 million in expenditures by State, local, and tribal governments in the aggregate or by the private sector.

Executive Order 13132 (Federalism)

The agency has reviewed this rule in accordance with Executive Order 13132 (Aug. 4, 1999), and has determined that it does not have “federalism implications.” This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

This rule does not have tribal implications under Executive Order 13175 (Nov. 6, 2000) that will require a tribal summary impact statement. The rule will not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and

Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Executive Order 13045 (Protection of Children)

This rule is not a covered regulatory action under Executive Order 13045 (Apr. 21, 1997). The rule will have no environmental health risk or safety risk that may disproportionately affect children.

Executive Order 12630 (Constitutionally Protected Property Rights)

This rule does not have takings implications under Executive Order 12630 (Mar. 15, 1988). The rule will not effect a taking or require dedications or exactions from owners of private property.

Executive Order 12988 (Civil Justice Reform Analysis)

This rule was drafted and reviewed in accordance with Executive Order 12988 (Feb. 5, 1996), and will not unduly burden the Federal court system. Complaints respecting unfair immigration-related employment practices are heard in the first instance by the Department of Justice, Executive Office for Immigration Review, Office of the Chief Administrative Hearing Officer, with only a miniscule number appealed each year to the Federal Circuit Courts of Appeal and an even smaller number of subpoenas or orders enforced by Federal District Courts.

List of Subjects

28 CFR Part 0

Authority delegations (Government agencies), Government employees, Organization and functions (Government agencies), Privacy, Reporting and recordkeeping requirements, Whistleblowing.

28 CFR Part 44

Administrative practice and procedure, Equal employment opportunity, Immigration.

For the reasons stated in the preamble, the Attorney General amends 28 CFR parts 0 and 44 as follows:

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

1. The authority citation for part 0 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515-519.

2. Section 0.53 is revised to read as follows:

§ 0.53 Immigrant and Employee Rights Section.

(a) The Immigrant and Employee Rights Section shall be headed by a Special Counsel for Immigration-Related Unfair Employment Practices (“Special Counsel”). The Special Counsel shall be appointed by the President for a term of four years, by and with the advice and consent of the Senate, pursuant to section 274B of the Immigration and Nationality Act (INA), 8 U.S.C. 1324b. The Immigrant and Employee Rights Section shall be part of the Civil Rights Division of the Department of Justice, and the Special Counsel shall report directly to the Assistant Attorney General, Civil Rights Division.

(b) In carrying out the Special Counsel’s responsibilities under section 274B of the INA, the Special Counsel is authorized to:

- (1) Investigate charges of unfair immigration-related employment practices filed with the Immigrant and Employee Rights Section and, when appropriate, file complaints with respect to those practices before specially designated administrative law judges within the Office of the Chief Administrative Hearing Officer, Executive Office for Immigration Review, U.S. Department of Justice;

(2) Intervene in proceedings involving complaints of unfair immigration-related employment practices that are brought directly before such administrative law judges by parties other than the Special Counsel;

(3) Conduct, on the Special Counsel's own initiative, investigations of unfair immigration-related employment practices and, where appropriate, file complaints with respect to those practices before such administrative law judges;

(4) Conduct, handle, and supervise litigation in U.S. District Courts for judicial enforcement of subpoenas or orders of administrative law judges regarding unfair immigration-related employment practices;

(5) Initiate, conduct, and oversee activities relating to the dissemination of information to employers, employees, and the general public concerning unfair immigration-related employment practices;

(6) Establish such regional offices as may be necessary, in accordance with regulations of the Attorney General;

(7) Perform such other functions as the Assistant Attorney General, Civil Rights Division may direct; and

(8) Delegate to any subordinate any of the authority, functions, or duties vested in the Special Counsel.

3. Revise part 44 to read as follows:

PART 44—UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES

Sec.

44.100 Purpose.

44.101 Definitions.

44.102 Computation of time.

44.200 Unfair immigration-related employment practices.

44.201 [Reserved].

- 44.202 Counting employees for jurisdictional purposes.
- 44.300 Filing a charge.
- 44.301 Receipt of charge.
- 44.302 Investigation.
- 44.303 Determination.
- 44.304 Special Counsel acting on own initiative.
- 44.305 Regional offices.

Authority: 8 U.S.C. 1103(a)(1), (g), 1324b.

§ 44.100 Purpose.

The purpose of this part is to implement section 274B of the Immigration and Nationality Act (8 U.S.C. 1324b), which prohibits certain unfair immigration-related employment practices.

§ 44.101 Definitions.

For purposes of 8 U.S.C. 1324b and this part:

(a) *Charge* means a written statement in any language that—

- (1) Is made under oath or affirmation;
- (2) Identifies the charging party's name, address, and telephone number;
- (3) Identifies the injured party's name, address, and telephone number, if the charging party is not the injured party;
- (4) Identifies the name and address of the person or other entity against whom the charge is being made;
- (5) Includes a statement sufficient to describe the circumstances, place, and date of an alleged unfair immigration-related employment practice;
- (6) Indicates whether the basis of the alleged unfair immigration-related employment practice is discrimination based on national origin, citizenship status, or both; or involves intimidation or retaliation; or involves unfair documentary practices;
- (7) Indicates the citizenship status of the injured party;

(8) Indicates, if known, the number of individuals employed on the date of the alleged unfair immigration-related employment practice by the person or other entity against whom the charge is being made;

(9) Is signed by the charging party and, if the charging party is neither the injured party nor an officer of the Department of Homeland Security, indicates that the charging party has the authorization of the injured party to file the charge;

(10) Indicates whether a charge based on the same set of facts has been filed with the Equal Employment Opportunity Commission, and if so, the specific office and contact person (if known); and

(11) Authorizes the Special Counsel to reveal the identity of the injured or charging party when necessary to carry out the purposes of this part.

(b) *Charging party* means—

(1) An injured party who files a charge with the Special Counsel;

(2) An individual or entity authorized by an injured party to file a charge with the Special Counsel that alleges that the injured party is adversely affected directly by an unfair immigration-related employment practice; or

(3) An officer of the Department of Homeland Security who files a charge with the Special Counsel that alleges that an unfair immigration-related employment practice has occurred or is occurring.

(c) *Citizenship status* means an individual's status as a U.S. citizen or national, or non-U.S. citizen, including the immigration status of a non-U.S. citizen.

(d) *Complaint* means a written submission filed with the Office of the Chief Administrative Hearing Officer (OCAHO) under 28 CFR part 68 by the Special Counsel or by a

charging party, other than an officer of the Department of Homeland Security, alleging one or more unfair immigration-related employment practices under 8 U.S.C. 1324b.

(e) *Discriminate* as that term is used 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.

(f) The phrase “for purposes of satisfying the requirements of section 1324a(b),” as that phrase is used in 8 U.S.C. 1324b(a)(6), means for the purpose of completing the employment eligibility verification form designated in 8 CFR 274a.2, or for the purpose of making any other efforts to verify an individual’s employment eligibility, including the use of “E-Verify” or any other electronic employment eligibility verification program.

(g) An act done “for the purpose or with the intent of discriminating against an individual in violation of [1324(a)(1)],” as that phrase is used in 8 U.S.C. 1324b(a)(6), means an act of intentionally treating an individual differently based on national origin or citizenship status in violation of 8 U.S.C. 1324b(a)(1), regardless of the explanation for the differential treatment, and regardless of whether such treatment is because of animus or hostility.

(h) *Hiring* means all conduct and acts during the entire recruitment, selection, and onboarding process undertaken to make an individual an employee.

(i) *Injured party* means an individual who claims to be adversely affected directly by an unfair immigration-related employment practice.

(j) The phrase “more or different documents than are required under such section,” as that phrase is used in 8 U.S.C. 1324b(a)(6), includes any limitation on an individual’s choice of acceptable documentation to present to satisfy the requirements of 8 U.S.C. 1324a(b).

(k) *Protected individual* means an individual who—

(1) Is a citizen or national of the United States;

(2) Is an alien who is lawfully admitted for permanent residence, other than an alien who—

(i) Fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization, or, if later, within six months after November 6, 1986; or

(ii) Has applied on a timely basis, but has not been naturalized as a citizen within two years after the date of the application, unless the alien can establish that he or she is actively pursuing naturalization, except that time consumed in the Department of Homeland Security's processing of the application shall not be counted toward the two-year period;

(3) Is granted the status of an alien lawfully admitted for temporary residence under 8 U.S.C. 1160(a) or 8 U.S.C. 1255a(a)(1);

(4) Is admitted as a refugee under 8 U.S.C. 1157; or

(5) Is granted asylum under 8 U.S.C. 1158.

(l) *Recruitment or referral for a fee* has the meaning given the terms “recruit for a fee” and “refer for a fee,” respectively, in 8 CFR 274a.1, and includes all conduct and acts during the entire recruitment or referral process.

(m) *Respondent* means a person or other entity who is under investigation by the Special Counsel, as identified in the written notice required by § 44.301(a) or § 44.304(a).

(n) *Special Counsel* means the Special Counsel for Immigration-Related Unfair Employment Practices appointed by the President under 8 U.S.C. 1324b, or a duly authorized designee.

§ 44.102 Computation of time.

When a time period specified in this part ends on a day when the Federal Government in Washington, D.C. is closed (such as on weekends and Federal holidays, or due to a closure for all or part of a business day), the time period shall be extended until the next full day that the Federal Government in Washington, D.C. is open.

§ 44.200 Unfair immigration-related employment practices.

(a)(1) *General.* It is an unfair immigration-related employment practice under 8 U.S.C. 1324b(a)(1) for a person or other entity to intentionally discriminate or to engage in a pattern or practice of intentional discrimination against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—

(i) Because of such individual's national origin; or

(ii) In the case of a protected individual, as defined in § 44.101(k), because of such individual's citizenship status.

(2) *Intimidation or retaliation.* It is an unfair immigration-related employment practice under 8 U.S.C. 1324b(a)(5) for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under 8 U.S.C. 1324b or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under that section.

(3) *Unfair documentary practices.* It is an unfair immigration-related employment practice under 8 U.S.C. 1324b(a)(6) for—

(i) A person or other entity, for purposes of satisfying the requirements of 8 U.S.C. 1324a(b), either—

(A) To request more or different documents than are required under § 1324a(b); or

(B) To refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual; and

(ii) To make such request or refusal for the purpose or with the intent of discriminating against any individual in violation of paragraph (a)(1) of this section, regardless of whether such documentary practice is a condition of employment or causes economic harm to the individual.

(b) *Exceptions.* (1) Paragraph (a)(1) of this section shall not apply to—

(i) A person or other entity that employs three or fewer employees;

(ii) Discrimination because of an individual's national origin by a person or other entity if such discrimination is covered by 42 U.S.C. 2000e-2; or

(iii) Discrimination because of citizenship status which—

(A) Is otherwise required in order to comply with law, regulation, or Executive order; or

(B) Is required by Federal, State, or local government contract; or

(C) The Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

(2) Notwithstanding any other provision of this part, it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire an individual, or to recruit or refer for a fee an individual, who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified.

§ 44.201 [Reserved].

§ 44.202 Counting employees for jurisdictional purposes.

The Special Counsel will calculate the number of employees referred to in § 44.200(b)(1)(i) by counting all part-time and full-time employees employed on the date that the alleged discrimination occurred. The Special Counsel will use the 20 calendar week requirement contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b), for purposes of determining whether the exception of § 44.200(b)(1)(ii) applies, and will refer to the Equal Employment Opportunity Commission charges of national origin discrimination that the Special Counsel determines are covered by 42 U.S.C. 2000e-2.

§ 44.300 Filing a charge.

(a) Who may file: Charges may be filed by:

(1) Any injured party;

(2) Any individual or entity authorized by an injured party to file a charge with the Special Counsel alleging that the injured party is adversely affected directly by an unfair immigration-related employment practice; or

(3) Any officer of the Department of Homeland Security who alleges that an unfair immigration-related employment practice has occurred or is occurring.

(b) Charges shall be filed within 180 days of the alleged occurrence of an unfair immigration-related employment practice. A charge is deemed to be filed on the date it is postmarked or the date on which the charging party otherwise delivers or transmits the charge to the Special Counsel.

(c) Charges may be sent by:

(1) U.S. mail;

(2) Courier service;

(3) Electronic or online submission; or

(4) Facsimile.

(d) No charge may be filed respecting an unfair immigration-related employment practice described in § 44.200(a)(1)(i) if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, as amended, unless the charge is dismissed as being outside the scope of such title. No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this section, unless the charge is dismissed as being outside the scope of this part.

§ 44.301 Receipt of charge.

(a) Within 10 days of receipt of a charge, the Special Counsel shall notify the charging party and respondent by certified mail, in accordance with paragraphs (b) and (c) of this section, of the Special Counsel's receipt of the charge.

(b) The notice to the charging party shall specify the date on which the charge was received; state that the charging party, other than an officer of the Department of Homeland Security, may file a complaint before an administrative law judge if the Special Counsel does not do so within 120 days of receipt of the charge; and state that the charging party will have 90 days from the receipt of the letter of determination issued pursuant to § 44.303(b) by which to file such a complaint.

(c) The notice to the respondent shall include the date, place, and circumstances of the alleged unfair immigration-related employment practice.

(d)(1) If a charging party's submission is found to be inadequate to constitute a complete charge as defined in § 44.101(a), the Special Counsel shall notify the charging party that the charge is incomplete and specify what additional information is needed.

(2) An incomplete charge that is later deemed to be complete under this paragraph is deemed filed on the date the initial but inadequate submission is postmarked or otherwise delivered or transmitted to the Special Counsel, provided any additional information requested by the Special Counsel pursuant to this paragraph is postmarked or otherwise provided, delivered or transmitted to the Special Counsel within 180 days of the alleged occurrence of an unfair immigration-related employment practice or within 45 days of the date on which the charging party received the Special Counsel's request for additional information, whichever is later.

(3) Once the Special Counsel determines adequate information has been submitted to constitute a complete charge, the Special Counsel shall issue the notices required by paragraphs (b) and (c) of this section within 10 days.

(e) In the Special Counsel's discretion, the Special Counsel may deem a submission to be a complete charge even though it is inadequate to constitute a charge as defined in § 44.101(a). The Special Counsel may then obtain the additional information specified in § 44.101(a) in the course of investigating the charge.

(f) A charge or an inadequate submission referred to the Special Counsel by a federal, state, or local government agency appointed as an agent for accepting charges on behalf of the Special Counsel is deemed filed on the date the charge or inadequate submission was postmarked to or otherwise delivered or transmitted to that agency. Upon receipt of the referred charge or inadequate submission, the Special Counsel shall follow the applicable notification procedures for the receipt of a charge or inadequate submission set forth in this section.

(g) The Special Counsel shall dismiss a charge or inadequate submission that is filed more than 180 days after the alleged occurrence of an unfair immigration-related employment practice, unless the Special Counsel determines that the principles of waiver, estoppel, or equitable tolling apply.

§ 44.302 Investigation.

(a) The Special Counsel may seek information, request documents and answers to written interrogatories, inspect premises, and solicit testimony as the Special Counsel believes is necessary to ascertain compliance with this part.

(b) The Special Counsel may require any person or other entity to present Employment Eligibility Verification Forms (“Forms I-9”) for inspection.

(c) The Special Counsel shall have reasonable access to examine the evidence of any person or other entity being investigated. The respondent shall permit access by the Special Counsel during normal business hours to such books, records, accounts, papers, electronic and digital documents, databases, systems of records, witnesses, premises, and other sources of information the Special Counsel may deem pertinent to ascertain compliance with this part.

(d) A respondent, upon receiving notice by the Special Counsel that it is under investigation, shall preserve all evidence, information, and documents potentially relevant to any alleged unfair immigration-related employment practices, and shall suspend routine or automatic deletion of all such evidence, information, and documents.

§ 44.303 Determination.

(a) Within 120 days of the receipt of a charge, the Special Counsel shall undertake an investigation of the charge and determine whether to file a complaint with respect to the charge.

(b) If the Special Counsel determines not to file a complaint with respect to such charge by the end of the 120-day period, or decides to continue the investigation of the charge beyond the 120-day period, the Special Counsel shall, by the end of the 120-day period, issue letters to the charging party and respondent by certified mail notifying both parties of the Special Counsel's determination.

(c) When a charging party receives a letter of determination issued pursuant to paragraph (b) of this section, the charging party, other than an officer of the Department of Homeland Security, may file a complaint directly before an administrative law judge in the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days after his or her receipt of the Special Counsel's letter of determination. The charging party's complaint must be filed with OCAHO as provided in 28 CFR part 68.

(d) The Special Counsel's failure to file a complaint with respect to such charge with OCAHO within the 120-day period shall not affect the right of the Special Counsel to continue to investigate the charge or later to bring a complaint before OCAHO.

(e) The Special Counsel may seek to intervene at any time in any proceeding brought by a charging party before OCAHO.

§ 44.304 Special Counsel acting on own initiative.

(a) The Special Counsel may, on the Special Counsel's own initiative, conduct investigations respecting unfair immigration-related employment practices when there is reason to believe that a person or other entity has engaged or is engaging in such practices, and shall notify a respondent by certified mail of the commencement of the investigation.

(b) The Special Counsel may file a complaint with OCAHO when there is reasonable cause to believe that an unfair immigration-related employment practice has occurred no more

than 180 days prior to the date on which the Special Counsel opened an investigation of that practice.

§ 44.305 Regional offices.

The Special Counsel, in accordance with regulations of the Attorney General, shall establish such regional offices as may be necessary to carry out the Special Counsel's duties.

Dated: December 14, 2016.

Loretta E. Lynch
Attorney General

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