

ANALYSIS

Crackdown on Bias Toward Immigrants



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Intentionally or inadvertently, some employers discriminate against job-seekers because they look or sound foreign. But a special unit in the Justice Department is out to stop such prejudice.

BY PHILIP BERLIN

During the deliberations in Congress over the legislation that was to become the Immigration Reform and Control Act of 1986, there was widespread concern that employer sanctions for hiring illegal aliens would result in discrimination against applicants and employees because of their citizenship. As Rep. Augustus Hawkins (D-Calif.) put it in debate on the law, "There are those in this nation who would use this measure as a pretext to deny employment to United States citizens and aliens lawfully residing here and by right, simply because they look and sound foreign."

Title VII of the Civil Rights Act of 1964, applicable to employers with 15 or more employees, already made employment discrimination on the basis of national origin illegal. But the U.S. Supreme Court, in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), had said that "national origin" was not the same as "citizenship" and that, therefore, the provision did not prohibit discrimination on the basis of citizenship.

In response to these circumstances, Congress included in the Immigration Reform and Control Act (IRCA) new deterrents to employment discrimination based on an applicant's or employee's national origin or citizenship. These provisions, administered through the Department of

Justice, prohibit any employer of four or more employees from discriminating on the basis of citizenship. IRCA gives the Justice Department additional authority to investigate national-origin discrimination by those employers who have between four and 14 employees.

Victims of discrimination may file "unfair immigration-related employment practice charges" with a "Special Counsel" within the Justice Department. Such victims may also file complaints with administrative-law judges if, for example, after investigation the special counsel declines to file a complaint.

Amendments to IRCA in 1990 strengthened the anti-discrimination system by increasing monetary penalties, extending coverage to agricultural workers, and specifying new offenses for which employers may be held liable. Among other things, the new law included an anti-retaliation provision to punish employers who threaten or retaliate against individuals for exercising their rights under the anti-discrimination provisions.

Under the 1990 amendments, an employer may not, in carrying out its obligation to verify employee work authorization and identity, request "more or different documents" from a job applicant than those required under IRCA. Nor may an employer refuse to honor documents tendered that on their face reasonably appear to be genuine. Civil fines from \$100 to \$1,000 apply to these violations, without regard to whether any individual has ac-

tually received disparate treatment on the basis of citizenship status.

The 1990 amendments also enhanced penalties for immigration-related employment discrimination, raising to \$2,000 (from \$1,000) the fine for the first finding of discrimination and to \$5,000 (from \$2,000) for the second instance of a discrimination finding. The amendments provide that administrative-law judges can impose new remedies on employers, such

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as educating hiring personnel in the requirements of the law, posting notices to inform employees about their rights and their employer's obligations, ordering the removal of a false performance review or false warning from an employee's personnel file, and ordering the lifting of any restrictions on an employee. Complainants may also receive lost wages.

The 1986 and 1990 provisions have spurred little litigation—but substantial administrative activity affecting major U.S. corporations. In most instances the Justice Department and the accused employers have reached settlements. For example, in a well-publicized case last January the department reached a settlement with a McDonald's restaurant in Lakeland, Fla., concerning three applicants—Czechoslovakian refugees—who were denied work although they produced work authorizations from the Immigration and Naturalization Service, driver's licenses, and Social Security cards. The department has also settled cases against such national companies as the Federal Express Corp., Northwest Airlines, United Airlines, American Airlines, the Northrop Corp., and the McDonnell Douglas Corp.

The immigration authorities aren't flinching at publicity. Indeed, in an April 5 memorandum to regional commissioners and district directors of the INS, Commissioner Gene McNary emphasized the educational value of publicizing violations.

The more than 1,600 charges of employment discrimination that the Office of Special Counsel has received to date under the 1986/1990 laws should cause an employer to sit up and take notice. It is apparent that the Justice Department and the OSC will be aggressively pursuing discrimination charges while concurrently publicizing ongoing settlements. A few cases are illustrative of the government's view of the law:

● A 1990 administrative case, *Valdivia-Sanchez v. LASA Marketing Firms*, Case No. 88200061, has been referred to by at least one OSC official as one of the most significant ALJ decisions to date. *LASA* established that "no direct evidence" of a "knowing and intentional act of discrimination based on actual knowledge" was necessary to prove a violation of the

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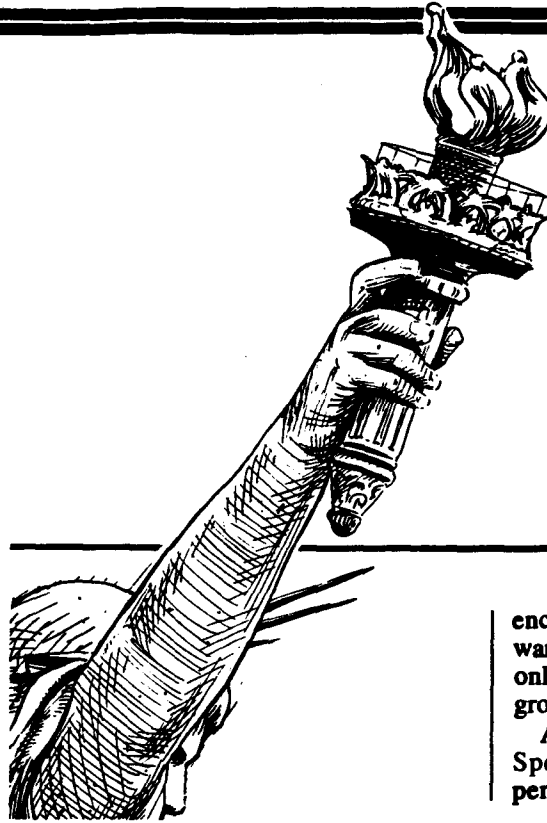
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anti-discrimination provisions. The case is also important because it confirmed that a pre-application telephonic rejection will be considered an unfair employment practice.

• In another administrative case decided last year, *Jones v. DeWitt Nursing Home*, Case. No 8820020, the employer defended its insistence that an employee produce a document not required by law (a birth certificate) as a good-faith effort to comply with the provisions of IRCA that require employers to check employees' documents. The ALJ ruled, however, that the employer's action was "a per se violation of the prohibition against citizenship status discrimination."

• And in *League of United Latin American Citizens v. Pasadena Independent School District*, 662 F. Supp. 443 (S.D. Tex. 1987), a federal judge enjoined the termination of employees for falsification of their Social Security numbers on their employment applications. The judge said, "The Act would be manifestly unjust if it



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encouraged qualified aliens to come forward and reveal their undocumented status only to have that very information serve as grounds for termination by employers."

A disturbing signal from the Office of Special Counsel, from the employer's perspective, is its apparent intention to

pursue allegations of reverse discrimination. Many employers, unable to find U.S. residents to staff positions, have recruited temporary workers from outside the country. There are at least two cases currently pending before ALJs in which U.S. citizens have alleged they were the subject of citizenship discrimination when they were denied employment opportunities provided to foreign applicants. But given the purpose of the anti-discrimination provisions—to avoid discrimination against individuals who "look foreign"—IRCA, it seems to me, would be misinterpreted if applied to these reverse-discrimination circumstances.

As in all legislation, interpretation through administrative and litigation processes will determine the true impact of IRCA. Bills recently have been introduced in the Senate and House of Representatives to repeal IRCA's employer sanctions, but unless and until such bills become law, employers should be aware that the Office of Special Counsel is aggressively enforcing IRCA—on occasion, in ways that may have been unforeseen. □