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Immigration ADVISORY ■

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Is the DOJ's "Pattern or Practice" of Extracting Settlements from Companies Not Hiring Immigrants Valid?

by Eileen Scofield

The Department of Justice's (DOJ) recent suit against SpaceX alleging discrimination of refugees and asylees brings focus to settlements the department has extracted from other employers under the Immigration and Nationality Act's unfair immigration-related employment practices statute, 8 U.S.C. Section 1324b.

Each company has denied liability in these settlements, preferring to simply pay whatever fine the DOJ assesses. But are these settlements valid?

It appears the DOJ has been seeking fines based on the number of internet job postings, not on evidence of any qualified individual discriminated against. But the number of postings is not the legal basis of a fine under Section 1324b. The fines are based on each qualified individual discriminated against, requiring employers to "pay a civil penalty of not less than $2,000 and not more than $5,000 for each individual discriminated against," with the amount periodically increased by regulation.

The DOJ appears to be seeking to settle these cases based on a "pattern and practice" damages theory. Generally, anyone can settle to most anything, but would or could a court agree? In court, perhaps the DOJ might argue that because of the employers' "bad acts" – a pattern and practice of discouraging qualified victims – the DOJ cannot produce any victims, so it is stepping into the shoes of the victims and seeking to use the "pattern or practice" language found in subsection (d)(2).

But that language is only relevant to private actions. In addition, pattern or practice is only offered as a potential threshold for a private action. Not only is the private actions portion of the law the only place in the statute that uses the language "pattern or practice" but pattern or practice is unrelated to fines and never identified as a fine measure or measure of damages to be paid, or measure of fines to be paid to the DOJ. The statute clearly states that even if the employer "has engaged in or is engaging in any such unfair immigration-related employment **practice**," (emphasis added) the fines are limited to "each individual discriminated against."

The statutory scheme is clearly restricted to each individual discriminated against. In addition, the statutory scheme directs the DOJ to promptly investigate and so timely learn of any individuals discriminated against. To ensure the

DOJ does so, the statute also requires the DOJ to issue notice within 120 days or file an independent investigation complaint within 180 days of a violation. Clearly such prompt action is for everyone's benefit, including, naturally, any individual that might be eligible for hire or backpay. Unfortunately, in 2016, the DOJ issued contradictory regulations, commonly resulting in multiyear investigations where the DOJ may only once a year addresses the matter.

The fine measure portion of the statute is unrelated to whether the DOJ's Civil Rights Division's Immigrant and Employee Rights Section (IER) might seek to use pattern or practice for evidentiary purposes, to show that the bad act was intentional.

Unless Congress chooses to change the statute to include the possibility of a class action or other language, if you find yourself facing a DOJ settlement offer, don't be too quick to settle, unless the settlement is in compliance with the statute. Just like the IER, which is responsible for enforcing the antidiscrimination provision of the Immigration and Nationality Act, all agree that discrimination against any individual because of their citizenship or national origin is wrong, and in some cases may be a violation of the law. There is merit in efforts to prevent such discrimination, but loyalty to a goal cannot override the clear language of the statute.

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