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Immigration Enforcement Creep in Immigrant & Employee Rights

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ABSTRACT

As the only agency charged with enforcing the Immigration Reform and Control Act's antidiscrimination provisions, the Immigrant and Employee Rights ("IER") section of the Department of Justice's Civil Rights Division plays an important role in protecting worker rights. Yet over the past decade, IER has moved from worker protection to immigration enforcement: a phenomenon this Article terms "immigration enforcement creep."

This observation is based on ten years of data collected from IER's settlement agreements, complaints filed, and telephone interventions. The data show that rather than protect noncitizen workers from unlawful discrimination, IER has moved its focus to enforcing immigration laws against employers who hire workers on temporary work visas. IER's enforcement choices lead to underenforcement of the antidiscrimination provisions Congress charged it with enforcing. This Article ultimately concludes that this immigration enforcement creep goes against IER's role as a worker protection agency and suggests principles of equitable enforcement that should guide its exercise of authority instead.

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INTRODUCTION

Imagine two scenarios. In the first, Jon is a United States citizen who runs across an ad for a tech company that encourages people with temporary work visas to apply. He doesn't apply for the job but instead files a complaint with the Immigrant and Employee Rights ("IER") section of the Department of Justice's Civil Rights Division. He alleges that the company discriminates against United States citizens in its hiring practices. In the second, a company routinely delays or refuses to allow noncitizen candidates to start work who present work authorization documents with pending expiry dates to complete their I-9 forms. But the company allows United States citizen candidates who present passports with pending expiry dates to start work without delay. Over the last decade, it has become more likely that IER will engage in enforcement action against the first employer rather than the second. This pattern of enforcement action demonstrates that what this Article terms "immigration enforcement creep." This Article argues that IER should shift its focus back to worker protection.

Both IER's role as a labor enforcement agency and the role labor enforcement agencies generally play in enforcing immigration law are understudied. The existing literature overlooks the Immigration Reform and Control Act's ("IRCA") antidiscrimination provisions as a source of protection for workers and the IER's role in enforcing those rights.[1] Instead, scholars usually focus on IRCA's antidiscrimination protections to counter arguments that rely on the Supreme Court of the United States' decision in *Hoffman Plastic Compounds, Inc. v. NLRB* that barred unauthorized workers from receiving backpay under the National Labor Relations Act.[2] Likewise, scholars have looked at how other federal antidiscrimination statutes and federal law more broadly protect the workplace rights of noncitizen workers who lack immigration status despite IRCA's bar on unauthorized work.[3] Additionally, Professor Ming

1. *See generally* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

2. 535 U.S. 137, 140 (2002); *see, e.g.*, Angela D. Morrison, *Executive Estoppel, Equitable Enforcement, and Exploited Immigrant Workers*, 11 HARV. L. & POL'Y REV. 295, 306–11 (2017); Christine N. Cimini, *Undocumented Workers and Concepts of Fault: Are Courts Engaged in Legitimate Decisionmaking?*, 65 VAND. L. REV. 389, 398–99 (2012); Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1374–75 (2009).

3. *See, e.g.*, Morrison, *supra* note 2, at 306–12 (citing Title VII and the FLSA as federal statutes providing workplace protections to immigrant workers); Geoffrey Heeren, *The*

Chen has shown how some federal workplace agencies (the Equal Employment Opportunity Commission, the National Labor Relations Board, and the Department of Labor) have protected immigrant workers' rights through their labor enforcement efforts despite the Court's decision in *Hoffman*.[4] Other scholars have examined the conflicts that occur between federal labor enforcement agencies that seek to protect immigrant workers' rights, particularly unauthorized workers, and immigration enforcement agencies who seek to deport those workers.[5] Finally, many scholars have documented the rise in immigration enforcement in the last three decades,[6] but none have looked at how federal labor enforcement agencies have themselves become an immigration enforcement agency.

This Article examines IRCA's worker protections and IER's role in enforcing it—demonstrating how a federal labor enforcement agency has become a rising locus of immigration enforcement. Rather than focus on protecting workers' rights, IER has shifted toward immigration enforcement over the past decade. To reach this finding, I analyzed IER's settlements, filed complaints, and interventions over the last ten years. The data show that IER's enforcement against employers who hire temporary workers is up over the last decade, and IER's enforcement activity against employers who discriminate against noncitizens in the I-9 employment verification process is down over the last decade; similar trends hold true in IER's filed complaints, settlement choices, and telephone interventions.[7] Moreover, IER has agreed to share information about employers who hire workers with temporary work visas with

Immigrant Right to Work, 31 GEO. IMMIGR. L.J. 243 *passim* (2017) (arguing that the "right of immigrants to work is 'objectively, deeply rooted [in] this Nation's history and tradition'").

4. Ming H. Chen, *Where You Stand Depends on Where You Sit: Bureaucratic Politics in Federal Workplace Agencies Serving Undocumented Workers*, 33 BERKELEY J. EMP. & LAB. L. 227, 230 (2012).

5. *See, e.g.*, Leticia M. Saucedo, *Immigration Enforcement Versus Employment Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303, 308–09 (2010).

6. *See, e.g.*, Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L.J. 1703, 1704 (2021) (demonstrating how jailhouse screening has expanded the reach of immigration enforcement); S. Lisa Washington, *The Fammigration Web*, 103 B.U. L. REV. 117, 159 (2023) (documenting the links between the family regulation system and immigration enforcement); Michael J. Wishnie, *State & Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1085 (2004) (showing expansion of immigration enforcement to local and state law enforcement agencies); Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 699–700 (2018) (discussing the role that school officials and school police officers play in identifying students as gang members and subjecting them to deportation).

7. *See infra* figs.3, 4, 6, 7, 8 & 11.

immigration enforcement agencies. In short, IER has increasingly devoted more time and resources to ensuring employers do not hire workers who have temporary work visas than to protecting noncitizen workers with work authorization from discrimination.

This represents a shift from worker protection to immigration enforcement. The shift began in 2017, with an express commitment on the part of IER to target employers who hire people with temporary work visas.[8] And the Department of Justice explicitly tied IER's efforts to its immigration enforcement goals.[9] Despite a new administration, the focus on immigration enforcement has continued.[10]

IER's shift to immigration enforcement has consequences. First, any of its limited resources that IER has used to enforce immigration law's limitations on temporary visa holders takes away from resources it could devote to protecting noncitizen workers from unfair immigration-related discrimination.[11] Second, it carries negative signaling effects to employers and employees that could result in more discrimination against noncitizen workers.[12]

This immigration enforcement creep is contrary to IRCA's worker protections and IER's mandate as a labor enforcement agency. The Article concludes with principles that IER should follow in exercising its authority to guard against immigration enforcement creep, namely equitable enforcement that takes into account the structural limits on the agency's authority and ethical norms.

The Article proceeds in four Parts. Part I introduces IRCA's antidiscrimination provisions and basis for IER's authority. Part II describes the data and establishes that IER has shifted from protecting workers' rights to enforcing immigration law over the last ten years. Part III discusses the harms caused by immigration enforcement creep at IER. Part IV describes the principles that should guide IER when it exercises its authority and concludes

8. Press Release, Dep't of Just., Off. of Pub. Affs., Justice Department Recognizes Anniversary of Buy American and Hire American Executive Order by Reaffirming its Commitment to Fight Discrimination Against U.S. Workers (Apr. 24, 2020), https://www.justice.gov/opa/pr/justice-department-recognizes-anniversary-buy-american-and-hire-american-executive-order [https://perma.cc/6HJZ-UV97].

9. *See infra* Section II.B.

10. *See infra* Section II.A.

11. *See infra* Section III.A.

12. *See infra* Section III.B.

that those principles suggest IER should focus on protecting the most vulnerable nonimmigrant workers and avoid immigration enforcement creep. This means that IER should focus on cases involving citizenship status discrimination against noncitizens, move back to enforcing IRCA's prohibition on unfair document practices, and avoid sharing information with immigration enforcement agencies.

I. THE IMMIGRATION REFORM AND CONTROL ACT'S ANTIDISCRIMINATION PROVISIONS

Congress passed IRCA in 1986.[13] The Act accomplished three things: (1) it created a legalization program; (2) it barred employers from knowingly hiring noncitizens who do not have work authorization and imposed on employers the obligation to verify workers' identities and work-authorization statuses; and (3) it prohibited unfair immigration-related practices.[14]

IRCA, as amended, bars employers from engaging in three types of unfair immigration-related practices.[15] First, employers may not "discriminate against any individual other than an unauthorized [noncitizen]" with respect to hiring, discharge, or recruitment on the basis of the worker's national origin status or citizenship status.[16] Second, the statute also prohibits employers from engaging in unfair documentary practices.[17] Unfair documentary practices are a form of national origin or citizenship status discrimination under the statute.[18] When employers verify an employee's identity and work authorization status as required by the statute,[19] they may not require more or different documents than those that the statute allows.[20] Third, employers may not retaliate against

13. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

14. *Id.* §§ 101, 102, 201.

15. 8 U.S.C. § 1324b(a).

16. 8 U.S.C. § 1324b(a)(1)(A)–(B). Though the statute uses the term "alien" to refer to noncitizens, throughout this Article I use the term "noncitizen" instead to avoid the pejorative connotations of the term "alien."

17. 8 U.S.C. § 1324b(a)(6).

18. *Id.*

19. 8 U.S.C. § 1324a(b).

20. 8 U.S.C. § 1324b(a)(6). The statute includes unfair documentary practices as employment practices, defined as a request "for more or different documents than are required . . . or refusing to honor documents . . . that on their face reasonably appear to be genuine . . . if made for the purpose or with the intent of discriminating against an individual in violation of [8 U.S.C. § 1324b(a)(1)]." *Id.*

workers because they intend to file or have filed a complaint under IRCA's unfair immigration-related provisions, or participated in an investigation or hearing into an unfair immigration-related practice.[21] Importantly, IRCA's antidiscrimination provisions are broader than Title VII's antidiscrimination provisions, because Congress intended it to address new forms of discrimination caused by IRCA's prohibition on unauthorized work.[22]

A. *IRCA's Antidiscrimination Provisions Differ from Title VII's*

IRCA's antidiscrimination provisions cover employers with four or more employees compared to Title VII's requirement of fifteen employees; therefore, it applies to more employers.[23] But unlike Title VII, which protects all workers from national origin discrimination regardless of their immigration status, IRCA limits which workers it protects. Its national origin antidiscrimination provisions do not protect "unauthorized [noncitizens]."[24] An unauthorized noncitizen is anyone who is not a lawful permanent resident or authorized for employment.[25] Additionally, employers may prefer U.S. citizens and nationals over equally qualified noncitizens.[26] The statute also excepts any claims for national origin discrimination that are covered under Title VII.[27]

IRCA also protects workers from a form of discrimination not prohibited by Title VII: citizenship status discrimination or unfair documentary practices motivated by the worker's citizenship status.[28] But the statute limits which workers it protects from discrimination on the basis of citizenship status—only "protected individuals" are covered by the citizenship status provisions.[29] Protected individuals are United States citizens or nationals,

21. 8 U.S.C. § 1324b(a)(5).
22. *See infra* Section IV.A.
23. *Compare* 8 U.S.C. § 1324b(a)(2)(A), *with* 42 U.S.C. § 2000e(b).
24. *Compare* 8 U.S.C. § 1324b(a)(1), *with* 42 U.S.C. § 2000e-2(a).
25. 8 U.S.C. § 1324a(h)(3).
26. *Id.* § 1324b(a)(4).
27. *Id.* § 1324b(a)(2)(B).
28. *Compare id.* § 1324b(a)(1)(B), *with* 42 U.S.C. § 2000e-2(a).
29. 8 U.S.C. § 1324b(a)(1)(B).

noncitizens who are recent lawful permanent residents, or refugees and asylees.[30]

Figure 1: Workers Covered Under IRCA & Title VII's Antidiscrimination Provisions[31]

Prohibited Conduct	Status of Worker	Title VII Protection?	IRCA Protection?
National Origin Discrimination	Unauthorized Workers	Y	N
	Work-Authorized Workers with Liminal Immigration Status	Y	Y
	Work-Authorized Nonimmigrants	Y	Y
	U.S. Citizens & Nationals, Legal Permanent Residents, and Refugees & Asylees	Y	Y
Citizenship Status Discrimination	Unauthorized Workers	N	N
	Work-Authorized Workers with Liminal Immigration Status	N	N
	Work-Authorized Nonimmigrants	N	N
	U.S. Citizens & Nationals, Legal Permanent Residents, and Refugees & Asylees	N	Y
Unfair Documentary Practices	Unauthorized Workers	Y (if motivated by national origin)	N
	Work-Authorized Workers with Liminal Immigration Status	Y (if motivated by national origin)	Y (if motivated by national origin and not covered by Title VII)
	Work-Authorized Nonimmigrants	Y (if motivated by national origin)	Y (if motivated by national origin and not covered by Title VII)
	U.S. Citizens & Nationals, Legal Permanent Residents, and Refugees & Asylees	Y (if motivated by national origin)	Y

30. *Id.* § 1324b(a)(3)(A)–(B). The statute excludes as "protected individuals" any lawful permanent residents who fail to apply for naturalization within 6 months of becoming eligible. *Id.* § 1324b(a)(3)(B).

31. For notes on Figure 1, see *infra* Appendix A.

Another key difference between IRCA and Title VII is the employment practices that each govern. Title VII prohibits more discriminatory employment practices than IRCA. Title VII includes hiring, firing, recruiting, compensation, classifying employees, and the discriminating in the privileges, terms, and conditions of employment.[32] In contrast, IRCA only covers the employment practices of hiring, firing, and recruiting.[33] However, both statutes cover employer retaliation.[34] So, under Title VII it would be unlawful for an employer to fail to promote a worker or subject a worker to a hostile work environment because of the worker's national origin. But under IRCA, it would not be unlawful for an employer to fail to promote or subject a worker to a hostile work environment because of the worker's national origin.

IRCA's remedies and penalties also differ from those under Title VII. First, only equitable remedies are available under IRCA.[35] Those equitable remedies include reinstatement, backpay, removal of false performance reviews or false warnings in an employee's file, lifting any restrictions on an employee's work, and an award of attorney's fees to a prevailing party (except if the party is the United States).[36] An employer may also be required to undergo monitoring for a period of up to three years to ensure compliance with the statute, to educate and train individuals involved in hiring about IRCA's requirements, and to post notices to employees about their rights under the statute.[37] Second, unlike Title VII, IRCA has civil penalties that can range from $100 to $10,000 per individual discriminated against.[38]

32. 42 U.S.C § 2000e-2(a)(1)–(2).
33. 8 U.S.C. § 1324b(a)(1).
34. 8 U.S.C. § 1324b(a)(5); 42 U.S.C. § 2000e-3(a).
35. *See* 8 U.S.C. § 1324b(g)(2), (h).
36. *Id.* § 1324b(g)(2)(B)(iii), (vii), (viii), (h).
37. *Id.* § 1324b(g)(2)(B)(i)–(ii), (v)–(vi).
38. *Id.* § 1324b(g)(2)(B)(iv).

Figure 2: Remedies & Penalties Under IRCA & Title VII's Antidiscrimination Provisions

		Title VII	IRCA
Remedies	Backpay	Y	Y
	Reinstatement	Y	Y
	Compensatory Damages	Y	N
	Punitive Damages	Y	N
	Future Pay	Y	N
	Attorney's Fees to Prevailing Party	Y	Y
	Other Equitable Relief Such as Monitoring, Training, Compliance, Posting Notices	Y	Y
Penalties	Civil	N	Y
	Criminal	N	N

Accordingly, IRCA and Title VII's protections, remedies, and penalties differ in a few key ways. Although IRCA reaches a type of discrimination, citizenship status, and covers employers that Title VII does not, its protections apply to more limited categories of employees. And though IRCA provides for civil penalties, IRCA's remedies are also more limited than Title VII's. Specifically, IRCA does not provide for compensatory damages, punitive damages, or future pay.

B. *Congress Established an Agency Within the Department of Justice to Enforce IRCA's Antidiscrimination Provisions*

When Congress enacted IRCA, it established a Special Counsel for Immigration-Related Unfair Employment Practices within the Department of Justice to enforce IRCA's antidiscrimination provisions.[39] The President appoints the Special Counsel, by and with the advice and consent of the Senate, for a term of four years.[40] And the President may designate someone to act as Special Counsel during any vacancy in the office.[41] In 2016, the Department of

39. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 102, 100 Stat. 3359, 3375–76 (codified at 8 U.S.C. § 1324b(c)(1)–(2)).

40. 8 U.S.C. § 1324b(c)(1).

41. *Id.*

Justice promulgated a final rule that renamed the Office of the Special Counsel for Immigration Related-Unfair Employment Practices Division to the "Immigrant and Employee Rights Section."[42]

Under IRCA, the Special Counsel has three areas of authority: (1) investigations; (2) prosecution and enforcement; and (3) education and outreach.[43] The Act does not expressly grant the Special Counsel rule-making authority, but other sections of the Immigration and Nationality Act expressly grant the Attorney General rulemaking authority and the authority to delegate rulemaking.[44]

With respect to investigations, IER investigates each charge received.[45] IER has broad investigatory authority.[46] It can request documents, require answers to written interrogatories, inspect premises, and solicit testimony.[47] The regulations also provide that employers being investigated must provide reasonable access to IER to examine any evidence they have, including "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 IRCA's antidiscrimination provisions.[48] IER may also initiate investigations without a charge.[49]

Within 120 days of receipt of the charge, IER determines whether it should engage in further investigation and ultimately decides whether there is reasonable cause to believe that the charge is true.[50] From there it decides whether to bring a complaint with respect to the charge before an administrative law judge.[51]

After finding cause, IER may file a complaint before an administrative law judge in the Office of the Chief Administrative Hearing Officer ("OCAHO").[52] When the IER files a complaint with

42. Standards and Procedures for the Enforcement of the Immigration and Nationality Act, 81 Fed. Reg. 91,768, 91,769, 91,789 (codified at 28 C.F.R. § 0.53(a) (2023)).

43. 8 U.S.C. § 1324b(c)(2), (d)(2), (*l*)(1)–(2)(B).

44. *Id.* § 1103(a)(1), (g)(2).

45. *Id.* § 1324b(d)(1).

46. *Id.* § 1324b(f)(2); 28 C.F.R. § 44.302 (2023).

47. 28 C.F.R. § 44.302(a) (2023).

48. *Id.* § 44.302(c).

49. 8 U.S.C. § 1324b(d)(1).

50. *Id.*

51. *Id.*

52. *Id.* § 1324b(d)(1), (e)(2); 28 C.F.R. § 44.303(c) (2023).

OCAHO, IER prosecutes the complaint; however, any person who filed the initial charge is considered a party, and the administrative law judge may allow any other person to intervene.[53]

IER engages in two types of alternative dispute resolution: telephone interventions and settlements. Telephone interventions are IER-facilitated resolutions of calls to the worker or employer hotline. They occur prior to an investigation and often prior to a charge, so IER has neither devoted resources to investigating the claim nor made a cause determination at that point.[54] Participation in the resolution is voluntary for employees and employers.[55] In contrast, settlements occur after a finding of cause, though they can occur prior to IER filing a complaint with OCAHO or even after IER files a complaint.

The statute requires that IER engage in education and outreach regarding IRCA's antidiscrimination provisions.[56] It requires IER to work with the Equal Employment Opportunity Commission, the Department of Labor, and the Small Business Administration to disseminate information about the antidiscrimination provisions of IRCA, the Immigration Act of 1990, and Title VII of the Civil Rights Act of 1964.[57] Congress directed the agencies to increase "the knowledge of employers, employees, and the general public concerning employer and employee rights, responsibilities, and remedies" under IRCA and the Immigration Act of 1990.[58] It also allows IER to contract with public and private organizations for outreach activities and expressly authorizes appropriations of up to $10 million per year for outreach activities.[59]

IER, then, has three main areas of authority. First, it investigates or initiates charges of discrimination brought under IRCA. Second, it enforces and prosecutes violations of the statute. Third,

53. 8 U.S.C. § 1324b(d)(1), (e)(3). If IER does not file a complaint with OCAHO within 120 days of the charge filing, the charging party may file a complaint with OCAHO. *Id.* § 1324b(d)(2). Nonetheless, IER may continue to investigate the charge and may intervene in any proceeding in front of OCAHO. *Id.*; 28 C.F.R. § 44.303(d)–(e) (2023).

54. *Telephone Interventions*, DEP'T JUST., C.R. DIV., https://www.justice.gov/crt/telephone-interventions#:~:text=IER%27s%20telephone%20intervention%20program%20is,than%20months%2C%20without%20contested%20litigation [https://perma.cc/YTL2-ZMCH] (Jan. 17, 2017).

55. *See id.*

56. 8 U.S.C. § 1324b(*l*)(1)–(2).

57. *Id.* § 1324b(*l*)(1).

58. *Id.*

59. *Id.* § 1324b(*l*)(2)–(3).

it engages in outreach and education about employer obligations and employee rights under IRCA.

II. IER'S INVESTIGATION AND ENFORCEMENT EFFORTS

A survey of IER settlements, filed complaints, and reported telephone interventions shows three things. First, IER has devoted more prosecutorial and investigatory resources to cases alleging citizenship status discrimination against U.S. workers in the last decade—in particular, it has focused on employers who hire workers with temporary visas. Second, IER has settled fewer cases based on IER-initiated investigations into pattern or practice claims over the last ten years.[60] In its settlement choices, IER has increasingly focused on cases resolving charges of discrimination against U.S. workers, reflected both by the number of cases and also the amount of backpay and civil penalties.[61] Third, IER has devoted fewer resources to issues and cases involving more vulnerable workers, such as those with liminal status.[62] These trends ultimately show that immigration enforcement creep has occurred at IER over the last decade.

A. *Description and Survey of IER's Investigation and Enforcement Efforts Since February 2013*

Over the last decade, IER has increasingly focused on enforcing IRCA's antidiscrimination provisions from an immigration enforcement perspective rather than a worker protection perspective. To survey IER's investigation and enforcement efforts, I reviewed all settlement agreements that IER entered into with employers between February 2013 and July 2023, all complaints that IER filed with OCAHO between February 2013 and July 2023, and all telephone interventions IER reported between February 2013 and July 2023.[63] I then looked for differences among presidential administrations in the category of discrimination IER focuses on, in the number of IER-initiated investigations, in the number of

60. *See infra* fig.6.

61. *See infra* figs.3, 9 & 10.

62. *See infra* Section II.A.

63. *See generally Settlements and Lawsuits*, DEP'T JUST., C.R. DIV., https://www.justice.gov/crt/settlements-and-lawsuits [perma.cc/36PT-L266] (Feb. 7, 2024); *Telephone Interventions*, DEP'T JUST., C.R. DIV., https://www.justice.gov/crt/telephone-interventions [https://perma.cc/YTL2-ZMCH] (Jan. 17, 2017).

pattern and practice claims versus individual claims, in the number of complaints that IER filed with OCAHO, in settlement choices, and in the types of issues for which IER used telephone interventions. In each settlement, IER had found cause in the underlying investigation. Thus, the settlement agreements can be a good snapshot of where IER has devoted further prosecutorial resources. The number of complaints that IER has filed is also a good indicator of which cases IER may view as a priority, given the significant resources the agency would have to devote to litigating a case. The settlement choices can also demonstrate IER's priorities at a given time by considering which types of claims it settles and for how much, for example. Finally, the telephone interventions are a good indicator of which issues IER believes it should devote its resources to resolving.

But this data set is not without its limitations. IER does not report the total number of charges it received or investigations it opened, so there is no way to compare the settlements and complaints to overall charges received. Nor does IER report every cause finding it reaches in its investigations. So, there is no comparative data to determine whether there is a mismatch between the charges in which IER found support for the charge and IER's decision to further prosecute the charge. Accordingly, while the publicly available data can give an idea of what IER is doing with respect to some of its investigation and enforcement activity and provide a snapshot of how that has changed over time, it cannot demonstrate definitively all IER's investigation and enforcement activities. Ultimately, as described below, an analysis of the data suggests that over the last decade IER's investigatory, enforcement, and settlement activities have shifted more towards immigration enforcement rather than worker protection.

1. Over the Last Decade, IER Has Increased the Investigative and Prosecutorial Resources It Devotes to Citizenship Status Discrimination Against U.S. Workers

There has been a shift in IER's enforcement and investigation activities with respect to the category of discrimination it focuses on. Increasingly, IER has focused on citizenship status claims, with significant increases in the number of citizenship status claims that involve discrimination against U.S. workers. IER's recent complaints that it has filed with OCAHO focus on citizenship status discrimination against U.S. workers. Likewise, IER's pursuit

of pattern and practices claims have shifted from claims that involve unfair documentary practices to claims that involve discrimination against U.S. workers.

The following are examples of the discrimination allegations[64] by category:

Citizenship Status Discrimination Against United States Citizens: A company rejects a candidate who was a naturalized United States citizen and only hires United States citizens who were citizens by birth.[65]

Citizenship Status Discrimination Against Non-United States Citizens: A company refuses to hire a legal permanent resident applicant because it misunderstands its obligations as a government contractor under federal laws, such as the International Traffic in Arms Regulations ("ITAR") and the Export Administration Regulations ("EAR"), and therefore limits positions to United States citizens.[66] A company refuses to consider a candidate because the candidate was an asylee.[67] A company restricts a position to only United States citizens.[68]

64. I used IER's description of its cause findings in the settlement agreement to designate the type of discrimination. In some instances, IER listed multiple forms of discrimination. I coded the type of discrimination based on the primary form of discrimination (e.g., unfair documentary practices when the settlement agreement also said the employer asked for different or more documents based on applicants' citizenship status), the basis on which the charging party filed the charge (e.g., retaliation when the charging party filed the charge because the employer terminated them when they protested the employer requiring different documents), or the basis of IER's independent investigation (e.g., unfair documentary practices if IER opened the investigation because of unfair documentary practices and then determined the employer engaged in those practices because of applicants' status as LPRs). Author's data available at https://docs.google.com/spreadsheets/d/1CFxwiZunIe14Knt3j2Q4tBqtmhsayfHN/edit?usp=share_link&ouid=109452920396284226820&rtpof=true&sd=true [https://perma.cc/FM6E-PGAY].

65. *See, e.g.*, Settlement Agreement, Security Management of South Carolina, LLC v. U.S. Dep't of Just., C.R. Div., Immigrant & Emp. Rts. Section (Oct. 6, 2020), https://www.justice.gov/media/1102516/dl?inline [https://perma.cc/2Q8G-DZZU].

66. *See, e.g.*, Settlement Agreement, Aerojet Rocketdyne, Inc. v. U.S. Dep't of Just., C.R. Div., Immigrant & Emp. Rts. Section (May 17, 2021), https://www.justice.gov/media/1151296/dl?inline [https://perma.cc/34TD-BNMX].

67. *See, e.g.*, Settlement Agreement, Themesoft, Inc. v. U.S. Dep't of Just., C.R. Div., Immigrant & Emp. Rts. Section (Apr. 20, 2018), https://www.justice.gov/media/949066/dl?inline [https://perma.cc/JD6E-UQ6G].

68. *See, e.g.*, Settlement Agreement, Nederlander Mktg., Inc. v. U.S. Dep't of Just., C.R. Div., Immigrant & Emp. Rts. Section (Jan. 18, 2023), https://www.justice.gov/d9/pages/attachments/2023/06/09/nederlander_marketing.pdf [https://perma.cc/T88E-SRCS].

Citizenship Status Discrimination Against U.S. Workers: A company advertises a job seeking only "non-U.S. citizens with temporary work visas."[69]

Unfair Documentary Practices: During the I-9 verification process, a company requires a noncitizen with work authorization to provide a DHS-issued work authorization document instead of accepting other acceptable documents that show work authorization, such as an unrestricted social security card.[70] During the I-9 or E-Verify process, a company requires noncitizens to produce more, or different, employment verification documents than the statute requires.[71] A company requires legal permanent residents or asylee to reverify their work authorization documents when the documents expire, despite reverification being unnecessary under IRCA.[72]

National Origin Discrimination: A medical practice fires a Mexican-American worker after the worker's co-workers subjected her to derogatory remarks about her perceived nationality and "fabricated a false accusation against the employee that played into national origin stereotypes to oust her from the workplace."[73] A restaurant rejects a qualified U.S. applicant because it prefers to hire Korean and Japanese workers.[74]

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69. *See, e.g.*, Settlement Agreement, Technology Hub, Inc. v. U.S. Dep't of Just., C.R. Div., Immigrant & Emp. Rts. Section (July 1, 2022), https://www.justice.gov/media/1229651/dl?inline [https://perma.cc/THX6-5WMB].

70. *See, e.g.*, Settlement Agreement, Hilton Worldwide, Inc. v. U.S. Dep't of Just., C.R. Div., Off. of Special Couns. for Immigr.-Related Unfair Emp. Pracs. (Mar. 9, 2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/03/11/Hilton.pdf [https://perma.cc/XC5T-T8CQ].

71. *See, e.g.*, Settlement Agreement, La Farine Bakery v. U.S. Dep't of Just., C.R. Div., Off. of Special Couns. for Immigr.-Related Unfair Emp. Pracs. (Nov. 25, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/12/04/LaFarine.pdf [https://perma.cc/EX2U-7M9K].

72. *See, e.g.*, Settlement Agreement, Panda Rest. Grp. v. U.S. Dep't of Just., C.R. Div., Immigrant & Emp. Rts. Section (June 28, 2017), https://www.justice.gov/media/901971/dl?inline [https://perma.cc/U56X-Z7RQ].

73. Press Release, Dep't of Just., Off. of Pub. Affs., Justice Department Secures Settlement with Nevada Medical Practice to Resolve National Origin Discrimination Claim, (Dec. 23, 2022), https://www.justice.gov/opa/pr/justice-department-secures-settlement-nevada-medical-practice-resolve-national-origin [https://perma.cc/8DDC-CL3D]; Settlement Agreement, Walter J. Willougby Jr., M.D., Ltd. v. U.S. Dep't of Just., C.R. Div., Immigrant & Emp. Rts. Section (Dec. 23, 2023), https://www.justice.gov/media/1266181/dl?inline [https://perma.cc/R3G6-H955].

74. *See, e.g.*, Settlement Agreement, Food Love 125, Inc. v. U.S. Dep't of Just., C.R. Div., Immigrant & Emp. Rts. Section (Feb. 20, 2018), https://www.justice.gov/media/938286/dl?inline [https://perma.cc/W5UM-3LTW].

Retaliation: After a worker calls IER's employee hotline to seek assistance with an immigration-related employment practice, the company suspends the worker for three days.[75] After a worker objects when a recruiter tells the worker that the company it is recruiting for will hire only United States citizens, the recruiter fails to consider the worker for employment.[76] A human resources employee tells a worker that the company will not rehire him because he had stated he was going to report the company to IER; the human resources employee also spreads misinformation about the worker to ensure the worker won't be rehired.[77] When an employee files a charge with the IER, the company bars the employee from the premises.[78]

a. Investigation

Beginning in the Trump administration, the category of discrimination that IER has increasingly expended its investigatory resources on has shifted from unfair documentary practices to citizenship status discrimination.[79] In the four-year period beginning in February 2013 and ending January 2017, IER focused primarily on unfair documentary practices.[80] In the four-year period beginning February 2017 and ending January 2021, IER focused primarily on citizenship status discrimination.[81] Likewise, from

75. *See, e.g.*, Settlement Agreement, Around the Clock Dispatch, Inc. v. U.S. Dep't of Just., C.R. Div., Immigrant & Emp. Rts. Section (July 15, 2021), https://www.justice.gov/media/1160696/dl?inline [https://perma.cc/4JCJ-HDMN].

76. *See, e.g.*, Settlement Agreement, Service Minds, Inc. v. U.S. Dep't of Just., C.R. Div., Immigrant & Emp. Rts. Section (Feb. 4, 2021), https://www.justice.gov/media/1122111/dl?inline [https://perma.cc/MUD6-ZS8F].

77. *See, e.g.*, Settlement Agreement, Southwest Key Programs v. U.S. Dep't of Just., C.R. Div., Immigrant & Emp. Rts. Section (Apr. 3, 2020), https://www.justice.gov/media/1061856/dl?inline [https://perma.cc/4E9E-9LKV].

78. *See, e.g.*, Settlement Agreement, N. Am. Shipbuilding LLC v. U.S. Dep't of Just., C.R. Div., Off. of Special Couns. for Immigr.-Related Unfair Emp. Pracs. (Oct. 15, 2015), https://www.justice.gov/d9/northamericanshipbuilding.pdf [https://perma.cc/9ZEY-YDJ8].

79. This Section uses the date the charge was filed or the date IER initiated its investigation, rather than the date of settlement, to determine to which administration to assign the data. This better reflects which administration chose to investigate the charge and to expend investigatory resources. For example, IER may have settled a charge that involved citizenship status discrimination against U.S. workers on March 1, 2021, but the bulk of the resources expended on investigating the charge and the cause finding would have occurred during the Trump administration; therefore, coding to the date the complaint was filed or the date IER opened an investigation better reflects which administration is responsible for the investigatory activity.

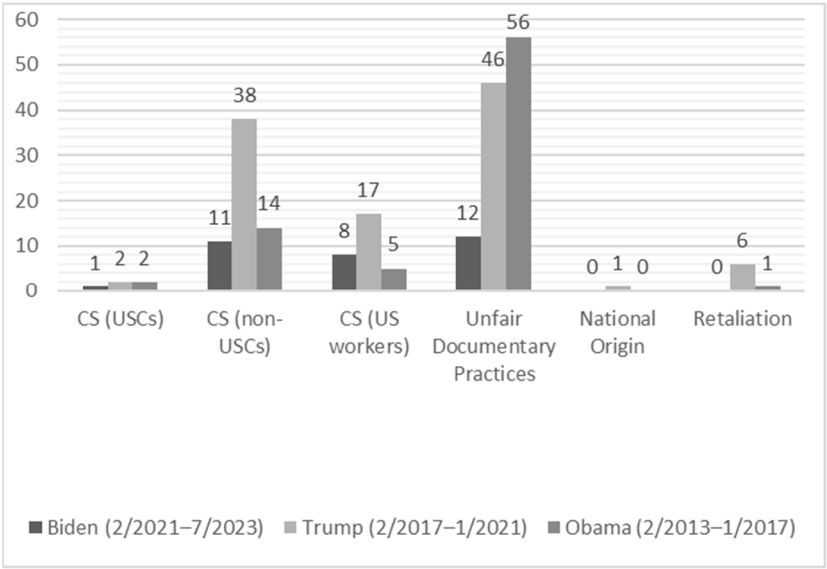
80. *See infra* fig.3.

81. *See infra* fig.3.

February 2021 to July 2023, IER focused primarily on citizenship status discrimination.[82]

The 2017 to 2021 period saw the highest level of activity involving citizenship status discrimination against U.S. workers: The Trump-era IER had nearly three times as many cases involving discrimination against U.S. workers as the Obama-era IER. Also, though the data capture only two and a half years of the Biden administration, as compared to four for both the Obama and Trump administrations, the Biden-era IER appears on track to come close to, but not surpass, the Trump-era IER with respect to the number of enforcement activities for citizenship status discrimination against U.S. workers.[83]

Figure 3: Number of Investigations by Category of Discrimination[84]



82. *See infra* fig.3.

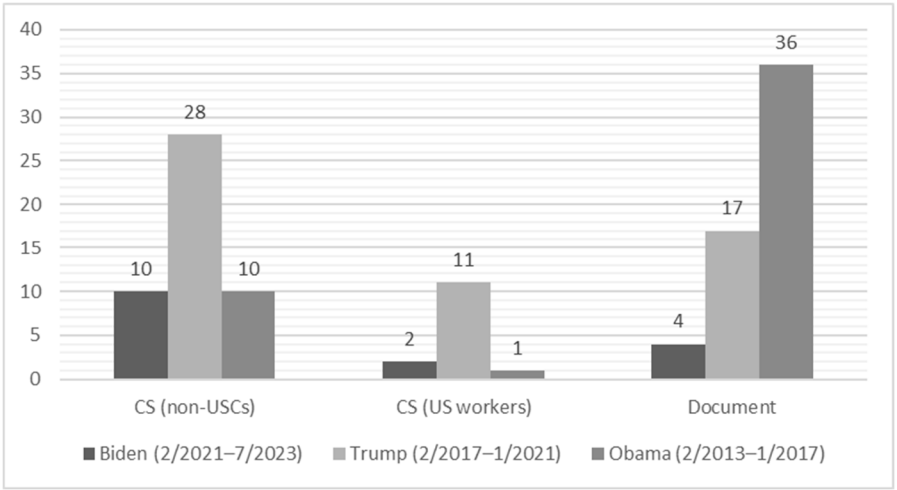
83. *See infra* fig.3.

84. I designated the category of discrimination based on IER's description of its cause findings in the settlement agreement. With respect to the type of citizenship status discrimination, I designated it as CS (USC) when the discrimination was because the individual was a United States citizen, a naturalized United States citizen, or an individual with dual citizenship (one of which was U.S. citizenship); I designated it as CS (non-USC) when the discrimination was because the individual was a legal permanent resident or asylee/refugee; and I designated it as CS (US workers) when the discrimination was because the employer limited a position to workers with nonimmigrant work visas.

However, when measuring as a percentage of the number of cases initiated during its administration, the Biden-era IER had the largest proportion of cases involving citizenship status discrimination against U.S. workers—25%, as compared to the Trump-era's 15.45% and the Obama-era's 6.41%.[85]

The shift can also be seen in the type of investigations that IER initiated without a charge: The Trump-era IER initiated the largest number of investigations that led to settlement. Most of those investigations—69.64%—involved citizenship status discrimination, 19.64% of which were citizenship status discrimination claims against U.S. workers.[86] The Biden-era IER has likewise mostly initiated citizenship status discrimination investigations: 75% of the Biden-era's IER-initiated investigations have been for citizenship status discrimination, with 12.5% involving citizenship status discrimination against U.S. workers. In contrast, only 23.4% of the IER-initiated investigations involved citizenship status discrimination in the Obama-era of which only 2.13% involved discrimination against U.S. workers, while 76.6% involved unfair documentary practices.[87]

Figure 4: IER-Initiated Investigations by Category of Discrimination



85. *See supra* fig.3.
86. *See infra* fig.4.
87. *See infra* fig.4.

b. Litigation & Prosecution

Both the Trump-era and Obama-era IER filed complaints with OCAHO, and the Obama-era IER filed an enforcement action in federal district court.[88] But the categories of discrimination differed.[89] During the Obama-era, IER filed two complaints alleging that the employer had engaged in citizenship status discrimination against U.S. workers,[90] and two complaints alleging that the employer had engaged in unfair documentary practices along with alleging that the employer had engaged in citizenship status discrimination against U.S. workers.[91] In contrast, the Trump-era IER filed two complaints alleging citizenship status discrimination against U.S. workers,[92] one complaint alleging citizenship status discrimination against non-United States citizens,[93] and one complaint alleging unfair documentary practices.[94] Three Trump-era cases settled and two of the Obama-era cases settled.[95] One

88. *See infra* fig.5. This Section uses the date IER filed a complaint with OCAHO rather than the date the investigation was opened or the case, if applicable, settled. This best captures which administration was most responsible for devoting litigation resources to the case.

89. *See infra* fig.5.

90. Complaint at 2, United States v. Autobuses Ejecutivos, LLC (Aug. 5, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/08/09/Omnibus.pdf [https://perma.cc/6JFZ-Q4MA]; Complaint-in-Intervention at 6, United States v. Estopy, OCAHO Case No. 12B00011 (Sept. 10, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/09/13/Estopy.pdf [https://perma.cc/96LM-KK6A].

91. Complaint at 1, United States v. Louisiana Crane Co., OCAHO Case No. 14B00102 (Aug. 29, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/09/18/LouisianaCrane1.pdf [https://perma.cc/87R7-G9RB]; Complaint at 1, United States v. Wash. Potato Co. (Nov. 14, 2016), https://www.justice.gov/opa/file/910256/dl?inline [https://perma.cc/UY4T-248P].

92. Complaint at 1, United States v. Crop Prod. Servs., Inc. (Sept. 28, 2017), https://www.justice.gov/opa/press-release/file/999756/dl?inline [https://perma.cc/S4HB-XP99]; Complaint at 2, United States v. Facebook, Inc. (Dec. 3, 2020), https://www.justice.gov/opa/press-release/file/1342786/dl?inline [https://perma.cc/5H3A-MEFD].

93. Complaint at 1–2, United States v. Chancery Staffing Sols., LLC (May 8, 2019), https://www.justice.gov/opa/press-release/file/1161446/dl?inline [https://perma.cc/B6P9-PMYC].

94. Complaint at 1, United States v. Tech. Marine Maint. Tex., LLC (July 25, 2017), https://www.justice.gov/opa/press-release/file/984596/dl?inline [https://perma.cc/TWA4-SWCA].

95. Settlement Agreement, Facebook, Inc. v. U.S. Dep't of Just., C.R. Div., Immigrant & Emp. Rts. Section (Oct. 19, 2021), https://www.justice.gov/opa/press-release/file/1443336/dl?inline [https://perma.cc/D855-JWBL]; Press Release, Dep't of Just., Off. of Pub. Affs., Justice Department Settles with Staffing Company to Resolve Immigration-Related Discrimination Claims (Feb. 18, 2020), https://www.justice.gov/opa/pr/justice-department-settles-staffing-company-resolve-immigration-related-discrimination-claims [https://perma.cc/V5GR-57Q4]; Settlement Agreement, Crop Prod. Servs. Inc. v. U.S. Dep't of Just., C.R. Div., Immigrant & Emp. Rts. Section (Dec. 18, 2017), https://www.justice.gov/d9/press-releases/attachments/2017/12/18/ier-cps_settlement_agreement_0.pdf [https://perma.cc/NU6Y-7947];

Obama-era case and one Trump-era case, both for unfair documentary practices, resulted in OCAHO granting IER's motion for remedies.[96] Another Obama-era case for unfair documentary practices initially settled, but IER had to seek enforcement of the settlement agreement in federal district court, which the court enforced and the appellate court affirmed.[97] IER alleged a pattern and practice claim after its independent investigation prior to reaching the settlement agreement and realleged the pattern and practice in the district court complaint.[98]

Figure 5: Complaints by Category of Discrimination[99]

	CS (US workers)	CS (non-USCs)	Document
Biden	0	0	0
Trump	2	1	1
Obama	2	0	2

c. Pattern and Practice Claims

The Obama-era IER pursued the most pattern and practice claims through IER-initiated investigations that ultimately settled. Twenty-five (or 53%) of its overall independent investigations were pattern and practice claims.[100] For the Trump-era IER it was

Settlement Agreement, La. Crane & Constr., LLC v. U.S. Dep't of Justice, C.R. Div., Off. of Special Couns. for Immigr.-Related Unfair Emp. Pracs. (Aug. 31, 2015), https://www.justice.gov/d9/lcc_2.pdf [https://perma.cc/KMF4-UHV9]; Settlement Agreement, Autobuses Ejecutivos, LLC v. U.S. Dep't of Justice, C.R. Div., Off. of Special Couns. for Immigr.-Related Unfair Emp. Pracs. (Sept. 26, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/10/07/Omnibus.pdf [https://perma.cc/4WN8-CK96].

96. United States v. Tech. Marine Maint. Tex., LLC, 13 OCAHO No. 1312 (June 28, 2018), https://www.justice.gov/eoir/page/file/1079276/dl?inline [https://perma.cc/PM6X-8DP9]; United States v. Estopy, 11 OCAHO No. 1256 (Aug. 13, 2015), https://www.justice.gov/sites/default/files/pages/attachments/2015/08/18/1256.pdf [https://perma.cc/8MSF-UN95].

97. United States v. Neb. Beef, Ltd., 901 F.3d, 930, 931–33, 35 (8th Cir. 2018).

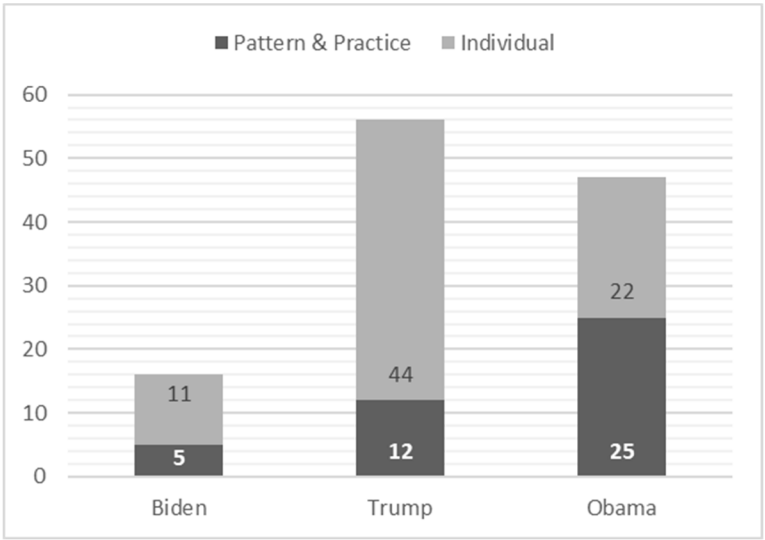
98. Settlement Agreement, Neb. Beef, Ltd. v. U.S. Dep't of Just., C.R. Div., Off. of Special Couns. for Immigr.-Related Unfair Emp. Pracs. (Aug. 24, 2015), https://www.justice.gov/d9/nebraskabeef.pdf [https://perma.cc/T3RW-T7TS]; Complaint at 1, United States v. Neb. Beef, Ltd., 901 F.3d, 930, 931–33, 35 (8th Cir. 2018).

99. I obtained information about Complaints on the IER website. *Settlements and Lawsuits*, DEP'T JUST., C.R. DIV., IMMIGRANT & EMP. RTS., https://www.justice.gov/crt/settlements-and-lawsuits [https://perma.cc/36PT-L266]. I used the date the Complaint was filed to sort by administration. If IER filed the Complaint between February 2021 and July 2023, I ascribed it to the Biden administration; if IER filed the Complaint between February 2017 and January 2021, I ascribed it to the Trump administration; and if IER filed the Complaint between February 2013 and January 2017, I ascribed it to the Obama administration.

100. *See infra* fig.6.

twelve (or 21%).[101] Five (or 31%) of the Biden-era IER's independent investigations have been for pattern or practice claims.[102]

Figure 6: Number of IER-Initiated Investigations That Were Pattern and Practice Claims Versus Individual Claims[103]



There has also been a move away from pursuing unfair documentary practices as a basis for an IER-initiated pattern or practice investigation: 96% of the Obama administration's pattern or practice independent investigations involved unfair documentary practices, as compared to 75% for the Trump administration and 40% for the Biden administration.[104]

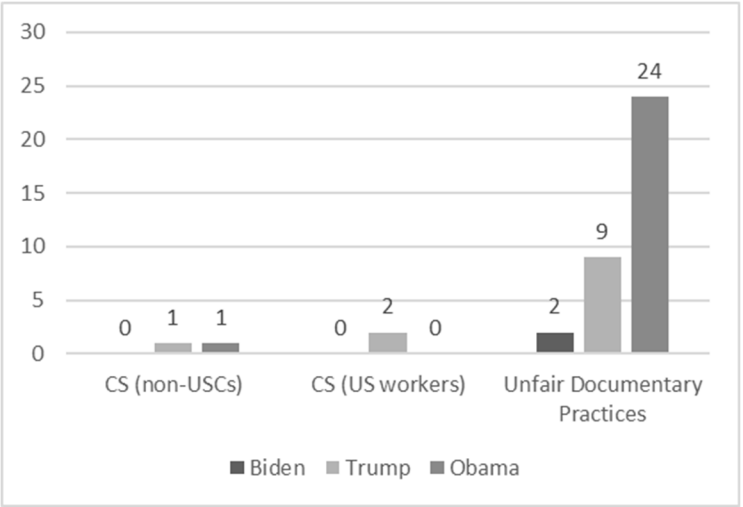
101. *See infra* fig.6.

102. *See infra* fig.6.

103. I designated a claim as a pattern or practice claim based on IER's description of its cause findings. Where IER determined the company had engaged in a pattern or practice of unlawful behavior, I designated the claim a pattern or practice claim. I designated all other claims individual. But an individual claim could involve multiple violations, not just one discriminatory act involving one individual.

104. *See infra* fig.7.

Figure 7: IER-Initiated Pattern and Practice Claims by Type of Discrimination[105]



2. Over the Last Decade, IER's Settlement Decisions Reflect a Shift in Focus from Unfair Documentary Practices to Discrimination Against U.S. Workers

The increasing focus on citizenship status discrimination, especially discrimination against U.S. workers, can be seen in the settlement choices that IER has made over the past decade.[106] IER has increased the number of settlements involving citizenship status discrimination, in particular cases involving citizenship status discrimination against U.S. workers. Likewise, settlements involving citizenship status discrimination against U.S. workers resulted in larger average civil penalties and higher average backpay awards than for other forms of discrimination.

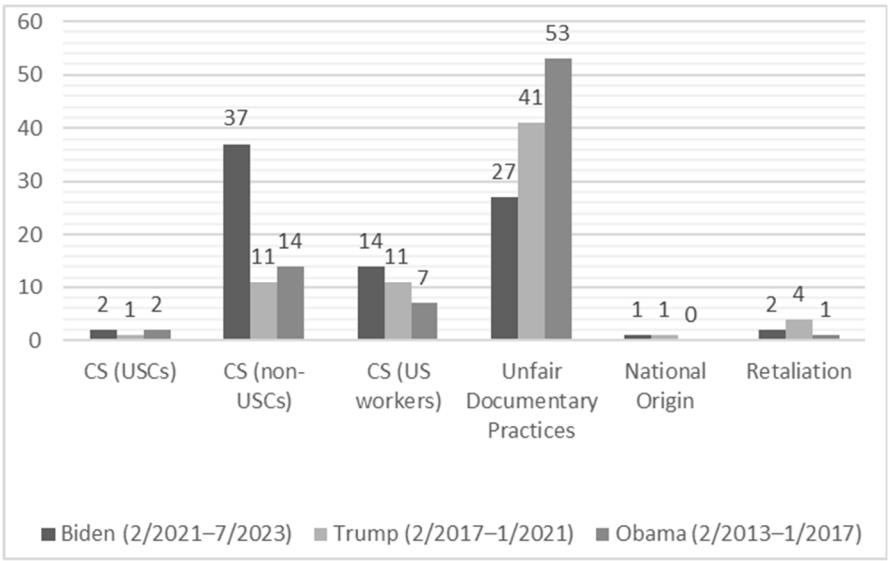
While 69.44% of settlements during the Obama-era IER resolved charges of unfair documentary practices, only 40.74% of settlements during the Biden-era IER resolved charges of unfair

105. None of the administrations initiated pattern and practice investigations into citizenship status discrimination against naturalized or dual citizens, national origin discrimination, or retaliation.

106. *See infra* fig.8. This Section uses the date of settlement to assign the action to a specific administration rather than the date the charge was initiated. Because this Section looks at settlement choices, using the date of settlement better reflects which administration was responsible for those choices.

documentary practices.[107] The Trump-era IER's share of settlements involving unfair documentary practices was only 14.29%.[108] The Biden administration and the Trump administration led with the percentage of settlements resolving charges of discrimination against U.S. workers, 25.39% and 14.29%, respectively.[109] The Obama administration's share of settlements involving discrimination against U.S. workers was 6.94%.[110]

Figure 8: Number of Settlements by Category of Discrimination (by date of settlement)

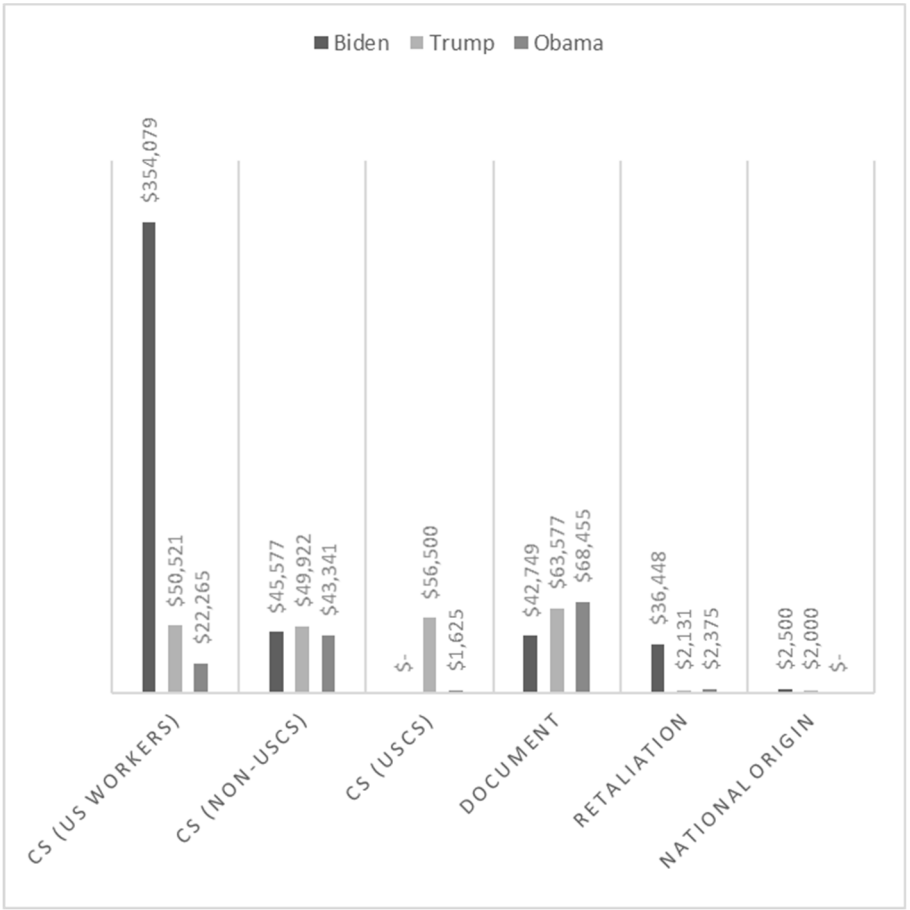


Over the last ten years, the civil penalties have shifted from higher average penalties in cases involving unfair documentary practices to higher average civil penalties in cases involving discrimination against U.S. workers: During the Obama administration the average civil penalty in charges for unfair documentary practices was $68,455 and during the Trump administration it was $63,577, but during the Biden administration it was $42,749.[111] With respect to discrimination against U.S. workers, the Biden-era

107. *See infra* fig.8.
108. *See infra* fig.8.
109. *See infra* fig.8.
110. *See infra* fig.8.
111. *See infra* fig.9.

IER had an average civil penalty of $354,079 as compared to the Obama-era's average of $22,265.[112]

Figure 9: Average Civil Penalties by Type of Discrimination

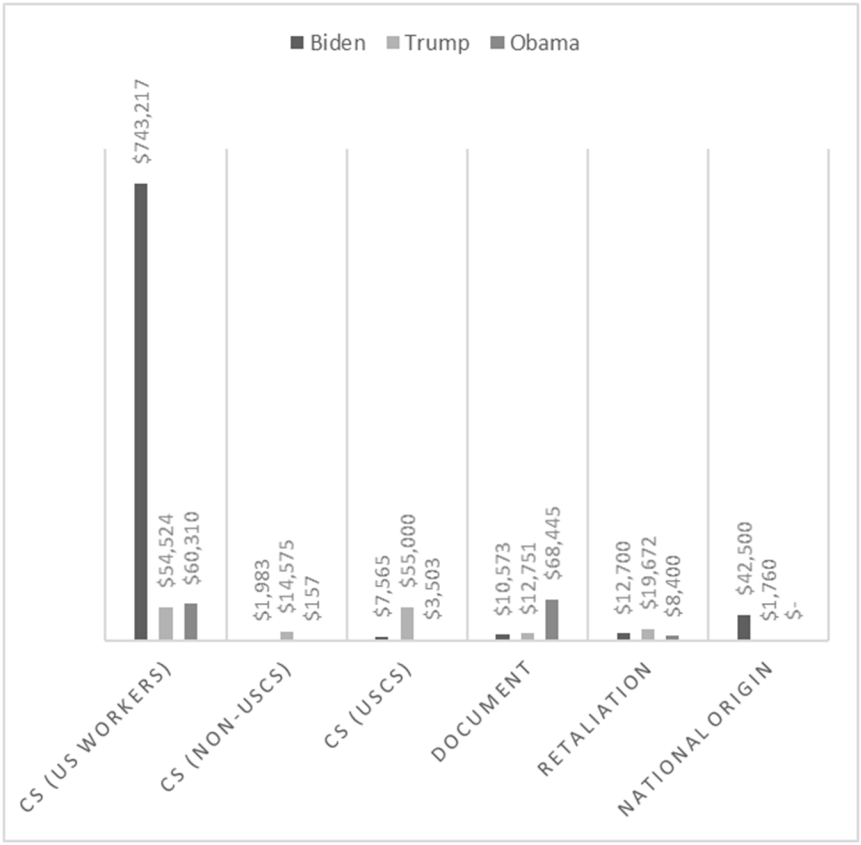


The average backpay also has shifted: During the Obama-era IER, the average backpay for unfair documentary practices was $68,455, during the Biden-era IER it was $10,573.[113] The Biden-era IER obtained average backpay of $743,217 to resolve charges

112. *See infra* fig.9.
113. *See infra* fig.10.

of discrimination against U.S. workers, while the Obama-era IER obtained an average of $60,310.[114]

Figure 10: Average Backpay[115] by Type of Discrimination



114. *See infra* fig.10.

115. Some settlement agreements set up a backpay fund and I included that total amount even though there may not be a full draw down on the fund. There were five total for the Biden administration, six total for the Trump administration, and twelve total for the Obama administration. For a breakdown of these backpay funds by administration, type of claim, and amount, see Appendix B. Likewise, a few settlement agreements did not state the amount of backpay, just that the employer was required to pay backpay. Those amounts are not included in the backpay amount because they are uncountable. There were two total for the Biden administration (one for CS (US workers) and one for unfair documentary practices); one total for the Trump administration (CS (non-USCs)); and six total for the Obama administration (two for CS (non-USCs) and four for unfair documentary practices). *See* Author's data available at https://docs.google.com/spreadsheets/d/1CFxwiZunIe14Knt3j2Q4tBqtmhsayfHN/edit?usp=share_link&ouid=109452920396284226820&rtpof=true&sd=true [https://perma.cc/FM6E-PGAY].

The choices each administration made in settling charges, from the type of charges to resolve to the amount of backpay and civil penalties, reflect an increasing focus on discrimination against U.S. workers.

3. Telephone Interventions Have Decreased in the Last Decade and the Highest Percentage Decrease Involves Issues Affecting More Vulnerable Workers

Since 2013, the percentage of telephone interventions has decreased. In particular, the number of interventions that address issues concerning workers with liminal status have decreased. IER posts descriptions of the interventions on its website and categorizes the interventions into six issues: (1) I-9 and Document Issues; (2) E-Verify; (3) Temporary Protected Status ("TPS") and Deferred Enforced Departure ("DED");[116] (4) Asylee/Refugee Issues; (5) Citizenship Status Discrimination; and (6) National Origin Discrimination.[117] IER's descriptions of each issue are as follows:

> I-9 and [D]ocument [I]ssues
>
> IER receives calls about a broad variety of Form I-9 and document-related issues. IER regularly intervenes when employers request specific documents or reject documents during the Form I-9 process based on a worker's citizenship or immigration status or based on a worker's national origin as prohibited by the anti-discrimination provision of the INA. In addition, IER sometimes educates entities other than employers about documents that non-citizens may possess.[118]
>
> . . . .
>
> E-Verify [Issues]
>
> . . . IER also helps work-authorized individuals whose employers have discriminated against them in the E-Verify process on the basis of their national origin or citizenship status, whose employers misused

116. TPS and DED are liminal forms of immigration status that allow work authorization. JILL H. WILSON, CONG. RSCH. SERV., RS20844, TEMPORARY PROTECTED STATUS AND DEFERRED ENFORCED DEPARTURE 3–4 (2023), https://crsreports.congress.gov/product/pdf/RS/RS20844/68 [https://perma.cc/QQD2-7V72]. TPS is a statutorily based form of humanitarian relief that allows the Secretary of the Department of Homeland Security to designate a country as a TPS country if the country has suffered a national disaster, the country has an ongoing armed conflict, or there are other sudden circumstances that make it unsafe for that country's nationals to return home. *Id.* at 2. Nationals from a TPS-designated country have the opportunity to apply for TPS. *Id.* at 3. DED is an administrative, temporary form of relief from removal and has no statutory basis. *Id.* at 4. DEDs "have been used on country-specific bases to provide relief from removal at the President's discretion, usually in response to war, civil unrest, or natural disasters." *Id.*

117. *Telephone Interventions*, DEP'T JUST., C.R. DIV., https://www.justice.gov/crt/telephone-interventions [https://perma.cc/EG7M-AY2B] (Jan. 17, 2017).

118. *Id.*

> E-Verify, and/or who have lost their jobs in connection with the E-Verify process.[119]
>
> . . . .
>
> [TPS] and [DED]
>
> IER often receives calls from workers and employers about automatic extensions of employment authorization documents ([“]EADs[“]) for beneficiaries of [TPS and DED]. . . . Both TPS and DED are short-term, temporary programs that affect large numbers of people whose EADs all expire on the same date. In recent years, [DHS] has issued automatic extensions of employment authorization for TPS and DED recipients to allow sufficient time to process applications for EADs. IER educates employers about the automatic extension of employment authorization in order to deter employers from rejecting valid work authorization documents or requesting specific documents during the I-9 process and to prevent the wrongful termination of TPS or DED beneficiaries.[120]
>
> Asylee/[R]efugee [I]ssues
>
> . . . IER educates employers about the documents that asylees and refugees may possess in order to prevent employers from wrongfully terminating asylees or refugees, or from rejecting documents or requesting specific documents during the Form I-9 process in violation of the anti-discrimination provision of the INA.[121]
>
> Citizenship [S]tatus [D]iscrimination
>
> . . . IER may intervene to assist workers who believe they may have been discriminated against based on their citizenship or immigration status, oftentimes based on a worker's belief that an employer prefers to employ workers of a different citizenship or immigration status.[122]
>
> National [O]rigin [D]iscrimination
>
> The anti-discrimination provision of the INA prohibits national origin discrimination with respect to hiring, firing, and recruitment or referral for a fee, by employers with more than three and fewer than 15 workers. Employers may not treat individuals differently because of their place of birth, country of origin, ancestry, native language, accent, or because they are perceived as looking or sounding “foreign.” All work-authorized individuals are protected from national origin discrimination. The Equal Employment Opportunity Commission has jurisdiction over employers with 15 or more workers.[123]

Over the last decade, the total number of telephone interventions has generally decreased. During the Obama administration, IER reported 977 total telephone interventions.[124] During the

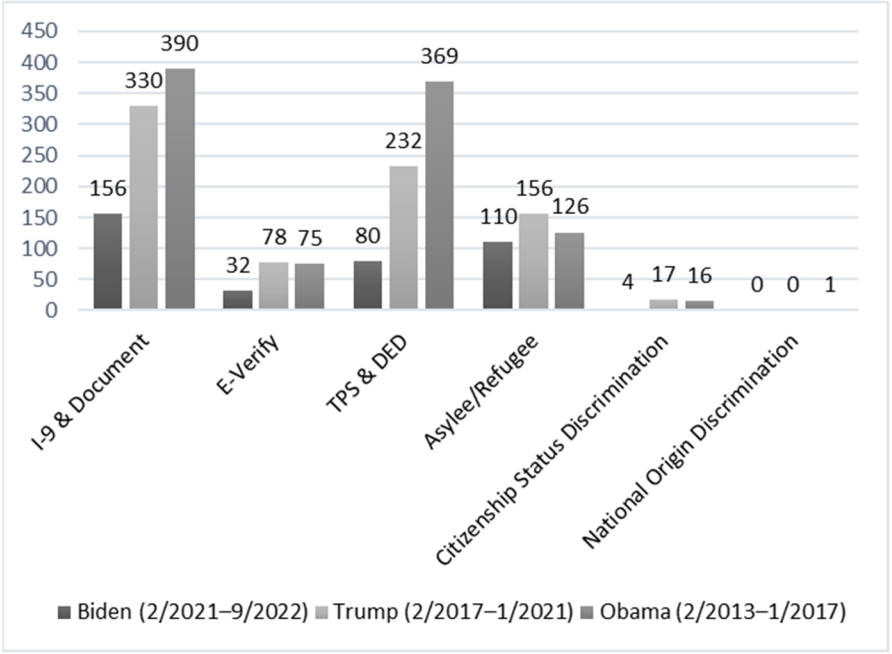
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *See infra* fig.11.

Trump administration, it reported 813 telephone interventions.[125] Though IER has only reported its telephone interventions through the 2022 fiscal year, meaning that the data only reflect twenty months of the Biden administration, if the Biden-era continues at the same rate, it will have engaged in around 916 telephone interventions.[126]

As a percentage of total telephone interventions, I-9 and document issues made up 38% of interventions in the Obama-era IER, 41% in the Trump-era IER, and 41% in the Biden-era IER.[127] As a percentage of total telephone interventions, E-Verify made up 8% of the interventions in the Obama-era IER, 10% in the Trump-era IER, and 8% in the Biden-era IER.[128] Thirty-eight percent of intervention were TPS and DED in the Obama-era IER, compared with 29% in the Trump-era IER and 21% in the Biden-era IER.[129] Asylee/Refugee telephone interventions were 13% of the total telephone interventions in the Obama-era IER, 19% in the Trump-era IER, and 29% in the Biden-era IER.[130] Citizenship status telephone interventions were 2% of the total interventions during the Obama-era and Trump-era IER.[131] They were 1% of the total interventions in the Biden-era IER.[132] In the last decade, there was only one national origin discrimination intervention and that was during the Obama-era IER.[133] Accordingly, the largest difference by issue is in TPS and DED interventions and asylee/refugee interventions: TPS and DED made up 9% less of total interventions in the Biden-era IER as compared to the Obama-era IER. Asylee/refugee interventions made up 16% more of the total interventions in the Biden-era IER as compared to the Obama-era IER.[134]

125. *See infra* fig.11.
126. *See infra* fig.11.
127. *See infra* fig.11.
128. *See infra* fig.11.
129. *See infra* fig.11.
130. *See infra* fig.11.
131. *See infra* fig.11.
132. *See infra* fig.11.
133. *See infra* fig.11.
134. *See infra* fig.11.

Figure 11: Telephone Interventions by Issue[135]



* * *

In sum, the data collected show three things. First, in the last decade IER has devoted more prosecutorial and investigatory resources to cases alleging citizenship status discrimination against U.S. workers. Second, IER has settled fewer cases based on IER-initiated investigations into pattern or practice claims over the last ten years. Finally, IER has devoted fewer resources to issues and

135. I used IER's categories, described in the text above, to designate the issue that the telephone intervention addressed. For listings of IER's telephone interventions organized by category and fiscal year, see *Telephone Interventions*, U.S. DEP'T JUST., C.R. DIV., https://www.justice.gov/crt/telephone-interventions-3 [https://perma.cc/S5T7-R629] (I-9 and Document Issues FY 2013–2023); *Telephone Interventions*, U.S. DEP'T JUST., C.R. DIV., https://www.justice.gov/crt/telephone-interventions-1 [https://perma.cc/8CVU-GVYL] (E-Verify FY 2009–2023); *Telephone Interventions*, U.S. DEP'T JUST., C.R. DIV., https://www.justice.gov/crt/telephone-interventions-2 [https://perma.cc/88SSD-XG4H] (TPS & DED FY 2010–2023); *Telephone Interventions*, U.S. DEP'T JUST., C.R. DIV., https://www.justice.gov/crt/telephone-interventions-4 [https://perma.cc/6QTS-3NA2] (Refugee and Asylee Statuses FY 2010–2023); *Telephone Interventions*, U.S. DEP'T JUST., C.R. DIV., https://www.justice.gov/crt/telephone-interventions-0 [https://perma.cc/S845-D4SV] (Citizenship Status FY 2011–2022); *Telephone Interventions*, U.S. DEP'T JUST., C.R. DIV., https://www.justice.gov/crt/telephone-interventions-5 [https://perma.cc-N2YG-H28M] (National Origin FY 2010, 2016).

cases involving more vulnerable workers, such as those with liminal status.

B. *The Department of Justice's Policy Goals for IER Shifted to Protecting U.S. Workers and Information Sharing with Immigration Enforcement Agencies*

IER was largely absent from DOJ's strategic plans and policy goals prior to 2017. When Trump took office, one of the executive orders he issued directed the heads of federal agencies to develop and propose policies for their agencies that would ensure employers would "hire American."[136] DOJ responded by announcing that IER would implement a "Protecting U.S. Workers Initiative."[137] Subsequently, when DOJ announced its strategic plan for fiscal years 2018–2022,[138] IER's role in enforcing IRCA's antidiscrimination provisions became a key part of the Trump administration's overall immigration enforcement agenda.[139] Specifically, IER was charged with increasing its focus on citizenship status discrimination against U.S. workers and with sharing information with immigration enforcement agencies.[140]

Among the many executive orders that Trump issued early in his administration was the "Buy American and Hire American" Executive Order.[141] The order stated it would "create higher wages and employment rates for workers in the United States, and . . . protect their economic interests" by "rigorously enforc[ing] and administer[ing] the laws governing entry into the United States of workers from abroad . . . ."[142] It further instructed the Attorney General to "propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse."[143] As a result of this order, IER announced its "Protecting

136. Exec. Order No. 13,788, 82 Fed. Reg. 18,837, 18,837–38 (Apr. 18, 2017).

137. Press Release, *supra* note 8.

138. The federal government's fiscal year begins on October 1 and ends on September 30; thus, the fiscal year 2018 began on October 1, 2017, and ended on September 30, 2018.

139. *See* U.S. DEP'T OF JUST., FY 2018–2022 STRATEGIC PLAN 13–15 (2017), https://www.justice.gov/archives/jmd/page/file/1071066/download [https://perma.cc/29M5-PWNT].

140. *Id.*

141. Exec. Order No. 13,788, 82 Fed. Reg. 18,837, 18,837 (Apr. 18, 2017).

142. *Id.*

143. *Id.* at 18,838.

U.S. Workers Initiative."[144] The purpose of the Initiative was to "target[], investigate[], and bring[] enforcement actions against employers that intentionally discriminate against U.S. workers due to a preference for temporary visa workers."[145]

DOJ's strategic plan for FY2014–FY2018 included as a goal to "[p]romote and protect American civil rights by preventing and prosecuting discriminatory practices."[146] It identified strategies to implement the goal, including to "[f]ight employment discrimination."[147] The plan didn't highlight IER's role other than to note it had "exclusive enforcement of the anti-discrimination provision of the Immigration and Nationality Act" and the forms of discrimination it prohibits.[148] The performance measures did not include IER-specific measures, but one of the performance measures tasked the Civil Rights Division, as a whole, with favorably resolving eighty-five percent of civil rights cases in each of the criminal and civil spheres.[149]

The DOJ's strategic plan for FY2018–FY2022 explicitly included IER's enforcement of IRCA as part of its strategies to meet its immigration enforcement goal of "[e]nsur[ing] an immigration system that respects the rule of law, protects the safety of U.S. Citizens and legal aliens and serves the national interest."[150] One of the strategies to achieve that goal was to increase the number of cases that IER prosecuted involving employers discriminating against U.S. workers:

> Strategy 3: Increase investigations, prosecutions, and adjudication of discriminatory or unlawful hiring practices against U.S. workers
>
> The Department will continue to prioritize adjudication of unlawful hiring and discrimination cases in which a U.S. company or individual is alleged to have violated provisions of the Immigration and Nationality Act (INA), which proscribe the employment of unauthorized aliens, immigration-related unfair employment practices, and immigration-related document fraud. The Department will also work collaboratively with DHS and other federal, state and local law

144. Press Release, *supra* note 8.

145. *Id.*

146. U.S. DEP'T OF JUST., FISCAL YEARS 2014–2018 STRATEGIC PLAN 10 (2013), https://www.justice.gov/sites/default/files/jmd/legacy/2014/02/28/doj-fy-2014-2018-strategic-plan.pdf [https://perma.cc/K823-6SBL].

147. *Id.* at 36.

148. *Id.* at 37.

149. *Id.* at 69.

150. U.S. DEP'T OF JUST., *supra* note 139, at 14.

> enforcement partners to develop policies and strategies to ensure effective civil and [criminal] prosecution of those who engage in discriminatory or unlawful hiring practices.[151]

The 2018–2022 strategic plan also included the number of citizenship status discrimination cases against U.S. workers that IER resolves as a key performance measure, designated as the "[p]ercentage of Immigration and Nationality Act (INA) Section 274B Protecting U.S. Workers Initiative discriminatory or unlawful hiring practice enforcement actions successfully resolved."[152] DOJ also pledged that it would cooperate with immigration and law enforcement agencies to crack down on what it termed "immigration-related benefits fraud," stating its attorneys would "work collaboratively with DHS, DOS, and other federal, state and local law enforcement partners to develop policies and strategies to ensure effective and successful prosecution of those who engage in immigration-related benefits fraud, which include the fraudulent obtaining of citizenship, a visa, permanent residency (Green card), and employment."[153]

DOJ's strategic plan for FY2022–FY2026 has as one of its goals to "[p]rotect [c]ivil [r]ights."[154] One of the strategies to achieve this goal is to "[e]nforce [f]ederal [a]nti-[d]iscrimination [l]aws."[155] The plan notes:

> The Department will enforce federal statutes that protect against discrimination on the basis of race, color, ethnicity, religion, sex, national origin, citizenship, immigration status, sexual orientation, gender identity, familial status, or disability, as well as those that protect the civil rights of servicemembers, incarcerated persons and individuals housed in public institutions, and individuals with limited English proficiency.[156]

None of the key performance indicators include enforcement activities conducted by IER, but one performance indicator is the "[n]umber of Limited English Proficiency individuals who access department-funded materials in their native language to understand federal hate crimes and anti-discrimination laws."[157]

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151. *Id.* at 15.

152. *Id.* at 16.

153. *Id.* at 15.

154. U.S. DEP'T OF JUST., FYS 2022–2026 STRATEGIC PLAN 41 (2021), https://www.justice.gov/doj/book/file/1516901/download [https://perma.cc/WUY2-L46G].

155. *Id.*

156. *Id.*

157. *Id.* at 42; *see id.* at 79–84 (listing all key performance indicators).

The Trump-era policies resulted in agreements between IER and federal immigration enforcement agencies in which IER agreed to provide those agencies with information that would assist them in their immigration enforcement activities. For instance, in 2018, IER signed a memorandum of understanding with the Department of Homeland Security's ("DHS") U.S. Citizenship and Immigration Services' ("USCIS") Fraud Detection and National Security directorate ("FDNS") to provide information about "[e]mployer information that may allow FDNS to identify potential violations of statutes and regulations governing employment-based immigrant and non-immigrant visa programs."[158] It also signed a memorandum of understanding with the Department of State in which it agreed to "share information about employers that may be engaging in unlawful discrimination, committing fraud, or making other misrepresentations in their use of employment-based visas, such as H-1B, H-2A, and H-2B visas."[159] The memoranda of understanding have not been revised since the end of the Trump administration, despite the FY2022–FY2026 strategic plan not including the explicit provisions for IER-involved immigration enforcement.

Beginning in 2017, with Trump's "Buy American and Hire American" Executive Order, IER's policies began to focus on citizenship status discrimination against U.S. workers. The policies expressly targeted employers who hired workers on temporary work visas. Moreover, IER entered into memoranda of understanding with immigration enforcement agencies to share information for the purpose of combatting fraud in work visas and in employment benefits. Though the "Protecting U.S. Workers Initiative" has been scrubbed from IER's website, these memoranda persist.

158. Memorandum of Understanding Between U.S. Dep't of Just., C.R. Div., & U.S. Dep't of Homeland Sec., U.S. Citizenship & Immigr. Servs., Regarding Information Sharing and Case Referrals 4 (May 11, 2018), https://www.uscis.gov/sites/default/files/document/legal-docs/MOU_5.11.2018.pdf [https://perma.cc/9QMU-4Z7F].

159. Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Departments of Justice and State Partner to Protect U.S. Workers from Discrimination and Combat Fraud (Oct. 11, 2017), https://www.justice.gov/opa/pr/departments-justice-and-state-partner-protect-us-workers-discrimination-and-combat-fraud [https://perma.cc/76SD-ZSJU]; *see* Summary of Memorandum of Understanding Between Dep't of State (DOS) Bureau of Consular Affairs (CA) and U.S. Dep't of Just. (DOJ) Immigrant & Emp. Rts. Section (IER) C. R. Div. on Info. Sharing, https://www.justice.gov/opa/press-release/file/1002441/download [https://perma.cc/CL75-UCX7].

C. *These Changes Represent a Shift Towards an Immigration Enforcement Role at IER Rather than a Worker Protection Role*

The new focus on enforcing IRCA's antidiscrimination provisions against employers who hire temporary visa holders represents a shift to immigration enforcement over worker protection. Although there is a secondary effect of getting relief for individual U.S. workers whom the employer passed over to hire temporary workers, the primary effect is immigration enforcement. IER is using IRCA's antidiscrimination provisions to enforce the INA's restrictions on nonimmigrant visas.

The INA restricts who can obtain a temporary work visa and the number of temporary work visas; this includes temporary visas for ambassadors and other consulate employees, individuals visiting for trade or investment, fashion models, registered nurses, foreign media, noncitizens with "extraordinary ability," professionals, executives or managers under the former NAFTA, and specialty occupations (H-1B).[160] Most of the categories require high levels of education and specialized skills.[161] Only two categories exist with no specific skill or education requirements: agricultural laborers (H-2A) and unskilled laborers (H-2B).[162] For H-1B visas, employers must attest that they will pay the greater of wages that are at least equal to the actual wage paid by the employer to other workers with similar experience and qualifications for the job in question, or the prevailing wage for the occupation in the area of intended employment.[163] Employers must obtain a labor certification for H-2A and -2B visas for which they demonstrate that there are not U.S. workers able, willing, qualified, and available for the job, and that hiring the noncitizen will not affect wages and working conditions of U.S. employees.[164]

This ties into immigration enforcement in two ways. First, employers who hire H-1B, H-2A and -2B visa holders violate separate

160. Immigration and Nationality Act, Pub. L. No. 82-414, §§ 101(a)(15), 203, 221, 66 Stat. 163, 167–69, 178–79, 191–92 (codified at 8 U.S.C. §§ 1101(a)(15), 1201).

161. For example, H-1B nonimmigrants must have a bachelor's degree or higher. 8 C.F.R. § 214.2(h)(4)(i)(A)(1) (2023). The regulations list a Nobel Prize as an example of "extraordinary ability." *Id.* § 214.2(o)(3)(iii)(A).

162. 8 U.S.C. § 1101(a)(15)(H)(ii)(a)–(ii)(b).

163. 8 U.S.C. §§ 1101(a)(15)(H)(i)(b1), 1182(t)(1)(A)(i)(I)–(II).

164. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a)–(ii)(b), 1182(a)(5)(A)(i).

provisions of the INA if they misrepresent that there are no available U.S. workers or that hiring the worker results in the displacement of a U.S. worker.[165] Those provisions carry both criminal and civil penalties.[166] Second, nonimmigrant workers who violate the restrictions on their nonimmigrant visas are subject to deportation.[167] That means that when IER focuses on ensuring employers do not hire temporary workers, it is, in effect, engaging in immigration enforcement. And, as explained next, that immigration enforcement role diminishes and undermines IER's worker protection roles.

III. THE CONSEQUENCES OF CHOOSING IMMIGRATION ENFORCEMENT OVER WORKER PROTECTION

IER's enforcement and investigatory choices have consequences. When the agency prioritizes matters involving employers hiring temporary workers, it is, in effect, taking on an immigration enforcement role, not a worker protection role. There are two main effects. First, it diverts resources away from worker protection and towards immigration enforcement. Second, it has negative signaling effects on employers and employees.

A. *IER's Immigration Enforcement Activities Use Resources That IER Should Devote to Worker Protection, Resulting in Reduced Enforcement of Antidiscrimination Provisions*

When IER focuses on immigration enforcement instead of worker protection, it diverts limited agency resources and undermines IER's worker protection role. First, the immigration enforcement regime is better resourced and better equipped to deal with violations of immigration law than IER. Second, because IER is engaging in immigration enforcement activities, its activities related to protecting worker rights are under resourced.

There are other agencies that enforce immigration law, and they are better resourced to do so. In the 2023 fiscal year, the entire

165. 8 U.S.C. §§ 1184(c)(14)(A)(i), 1182(n)(1)(E)(i).

166. 8 U.S.C. § 1184(c)(14)(A)(i) (imposing up to a $10,000 penalty per incident); *id.* § 1182(n)(2)(C)(iii)(I) (imposing up to a $35,000 penalty for willfully displacing a U.S. worker); 18 U.S.C. § 1546(b) (imposing criminal penalties for presenting false information on an immigration application or form required for an immigration benefit under the INA).

167. 8 U.S.C. § 1227(a)(1)(C).

Civil Rights Division had only 847 positions, 538 of which were attorney positions.[168] It is unclear how many of the positions are in IER specifically, but the Civil Rights Division of the Department of Justice has eleven subdivisions.[169] By contrast, the Office of the Principal Legal Advisor for Immigration and Customs Enforcement in DHS had 1,971 attorneys authorized for FY2023.[170] In addition, DHS's Enforcement & Removal Operations had 8,424 full-time employees authorized for FY2023,[171] and Homeland Security Investigations, which also carries out worksite enforcement activities in addition to other enforcement activities, had 8,684 full-time employees authorized for FY2023.[172] Further, IER's Special Counsel position is vacant as of the publication of this Article, and the position has been vacant since at least 2017.[173]

This fits in with an overall pattern of the federal government prioritizing immigration enforcement by spending more and more on immigration enforcement efforts, while underfunding federal labor and employment agencies' efforts.[174] Indeed, a recent analysis of Congressional budgets from 2012–2021 found that the "average annual funding for immigration enforcement [was] over 10 times as much as labor standards enforcement funding."[175]

Engaging in immigration enforcement instead of labor enforcement also matters because IER is the only federal agency that enforces IRCA's prohibitions on discrimination in employment.

168. U.S. DEP'T OF JUST., GENERAL LEGAL ACTIVITIES, CIVIL RIGHTS DIVISION (CRT) 72 (2022), https://www.justice.gov/file/1489456/download#:~:text=The%20FY%202023%20budget%20request,and%20confirmed%20by%20the%20Senate [https://perma.cc/D69W-AZFA].

169. *Our Work*, U.S. DEP'T JUST., C.R. DIV., https://www.justice.gov/crt/about-division [https://perma.cc/32KH-Y68V] (June 1, 2023).

170. DEP'T OF HOMELAND SEC., U.S. IMMIGR. & CUSTOMS ENF'T, BUDGET OVERVIEW: FISCAL YEAR 2023 4 (2022), https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Immigration%20and%20Customs%20Enforcement_Remediated.pdf [https://perma/cc/4XTJ-L6EH].

171. *Id.* at 115.

172. *Id.* at 73.

173. Washington Post & Partnership for Public Service, *Biden Political Appointee Tracker*, WASH. POST, https://www.washingtonpost.com/politics/interactive/2020/biden-appointee-tracker/ [https://perma.cc/2RL8-BTRY] (Mar. 11, 2024, 12:10 PM) (showing that the position has remained vacant throughout the Biden administration); P'SHIP FOR PUB. SERV., THE REPLACEMENTS: WHY AND HOW "ACTING" OFFICIALS ARE MAKING SENATE CONFIRMATION OBSOLETE 7 (2020), https://ourpublicservice.org/wp-content/uploads/2020/09/The-Replacements-1.pdf [https://perma.cc/H9RS-28WA] (showing that the position remained vacant throughout the Trump administration).

174. DANIEL COSTA, ECON. POL'Y INST., THREATENING MIGRANTS AND SHORTCHANGING WORKERS 1 (2022), https://files.epi.org/uploads/259743.pdf [https://perma.cc/W7FU-EZGD].

175. *Id.* at 5 fig.B.

Consequently, any immigration enforcement activity takes away resources from the agency's efforts to protect workers. The data suggest that has occurred. In particular, two trends in the data support this inference. As IER increased its activities that focused on employers who hire temporary workers, its telephone interventions, which, on the whole, tend to benefit more vulnerable workers, went down; additionally, its settlements with respect to unfair documentary practices as a percentage of cases settled went down.[176] Additionally, the number of IER-initiated pattern or practice claims went down.[177]

The decrease in number of telephone interventions and in the percentage of unfair documentary practices cases both show how focusing on immigration enforcement detracts from protecting vulnerable workers' employment rights. The telephone interventions often result in workers with employment authorization getting relief who otherwise might have been left jobless. Telephone interventions involving people with TPS and DED, which often involve unfair documentary practices, are good examples of this.[178] IER described one telephone intervention as follows:

> On August 28, 2018, IER assisted a worker with Temporary Protected Status (TPS) from Yemen with renewing his driver's license and also helped ensure that he could continue his work driving without interruption. The caller had an automatically extended Employment Authorization Document but the local DMV was not familiar with the automatic extension. IER contacted the DMV and explained the automatic extension and the DMV renewed the caller's driver's license. IER also then contacted the company the caller drives with and explained the caller's automatic extension and renewed driver's license. The company decided to allow the caller to continue to work without any delay.[179]

Without IER's assistance, the worker would have had a difficult time litigating the claim. Because he was not a "U.S. worker," despite having work authorization, he would have needed to prove that the employer treated him differently with respect to its documentary practices due to his national origin. That intent is hard to prove, as demonstrated in a Ninth Circuit Court of Appeals case,

176. *See supra* figs.7, 8 & 11.

177. *See supra* fig.6.

178. *See supra* note 91.

179. *Telephone Interventions*, U.S. DEP'T JUST., C.R. DIV., https://www.justice.gov/crt/telephone-interventions-2 [https://perma.cc/8SSD-XG4H] (TPS & DED FY 2010–2023).

Robison Fruit Ranch, Inc. v. United States.[180] In *Robison*, the employer required U.S. citizens to provide a driver's license and a social security card, but it required noncitizens to provide an immigration document and a social security card.[181] The court said the employer did not violate IRCA's provisions prohibiting unfair documentary practices partly because the government could not show that the employer required different documents because of a discriminatory intent.[182] Ultimately, when IER engages in telephone interventions and devotes its resources to unfair documentary practices, more authorized workers are better protected. Thus, the decline means that fewer workers are protected.

Likewise, the decline in IER-initiated pattern or practice claims means that fewer vulnerable workers get relief. First, relying on workers to bring individual claims themselves can result in an emotional cost to the workers.[183] Second, workers, especially noncitizen workers, often fear retaliation if they report discrimination.[184] Third, workers may lack knowledge about their rights or how to enforce them.[185] The problems of relying on workers to bring charges about workplace violations are exacerbated in low-wage workforces.[186] A model that relies on workers to bring claims results in less protection of workers' rights because "[w]orkers are overdeterred from claiming, and employers may be under-deterred from complying, creating a self-perpetuating enforcement gap in

180. 147 F.3d 798 (9th Cir. 1998).

181. *Id.* at 800.

182. *See id.* at 800–02 (rejecting the government's position that it was "irrelevant that [the employer] did not intend to discriminate").

183. Angela D. Morrison, Duke-*ing Out Pattern or Practice After* Wal-Mart*: The EEOC as Fist*, 63 AM. U. L. REV. 87, 101–02 (2013) (citing Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 723 (2012)).

184. *Id.* (first citing Sternlight, *supra* note 183; then citing Leticia M. Saucedo, *Immigration Law Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Workplace*, 38 FORDHAM URB. L.J. 303, 310 (2010)) (explaining that fears of retaliation or detection by U.S. Immigration and Customs Enforcement will make workers reluctant to exercise their employment rights); *see also* Kati L. Griffith, *Discovering "Immployment" Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 419–23 (2011) (discussing the impact of state and local immigration regulation on the enforcement of Title VII); Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 931–32 (2008) (discussing how employers use workers' immigration status to control noncitizen employees and prevent them from complaining about workplace conditions); Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1073 (2014) (finding that 43% of workers did not make a claim even though they experienced a workplace problem, with the most common reason being fear of retaliation).

185. Alexander & Prasad, *supra* note 184, at 1072–73.

186. *Id.* at 1073.

labor and employment law."[187] Finally, addressing workplace claims individual charge by individual charge "risks leaving the forces driving noncompliance unaddressed and results in an unending game of whack-a-mole."[188] Thus, IER's move away from agency-initiated pattern and practice claims means that workers are more vulnerable and likely results in less worker protection.

Therefore, IER's shift to immigration enforcement undermines its worker protection efforts. Because IER lacks resources to begin with, any redirection of resources takes away from IER's core mission of protecting workers from unfair immigration practices. Further, it means that IER must rely even more on individual workers to bring claims. This results in less enforcement of IRCA's antidiscrimination provisions overall.

B. *IER's Immigration Enforcement Activities Carry Negative Signaling Effects*

IER's shift to immigration enforcement has negative signaling effects to employers and workers. It may make employers overly cautious and result in their not hiring noncitizen workers, or it may incentivize employers to hire unauthorized workers instead. For employees, IER's swing towards immigration enforcement may chill employees from bringing charges to IER and contribute to negative stereotypes about immigrants taking jobs from U.S. workers.

1. Employers

IER's shift in focus to employers who hire workers with temporary work visas may result in two negative consequences. It may make employers overly cautious, resulting in more document discrimination and citizenship status discrimination against noncitizens. The change in focus also may result in employers hiring more undocumented workers, resulting in more exploitation of vulnerable workers.

187. *Id.* (describing results of studies focused on the enforcement of wage and hour laws in low-wage workplaces).

188. David Weil, *Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change*, 60 J. INDUS. RELS. 437, 441 (2018).

One negative signaling effect of IER's shift to immigration enforcement is that it may deter employers from hiring noncitizen workers. As Shannon Gleeson and Kate Griffith have demonstrated, employers are also subject to the immigration state.[189] They note that "[b]oth mundane bureaucratic processes and coercive enforcement initiatives can increase the costs and risks associated with hiring even those workers who are authorized to work and do not require a visa application."[190] The increased costs and risks occur because employers are subject to audit and face liability when they violate immigration laws governing the employment of noncitizens; the paperwork associated with verifying employees' authorized work status can be confusing and even misleading; and employers operate in a regulatory system with few "market incentives" to avoid terminating employees since employment is at-will and most workforces are nonunionized.[191] As a result, for employers, it may make more sense to avoid hiring noncitizens in the first place, as the costs and risks outweigh the risk that they will be subject to labor enforcement.[192] Indeed, after IER announced the "Protecting U.S. Workers Initiative," firms that represent employers warned "the DOJ is likely to continue to pursue investigations of employers who hire significant numbers of foreign visa workers."[193]

Perhaps counterintuitively, IER's shift from worker protection to immigration enforcement may also incentivize employers to hire unauthorized workers to achieve a more exploitable workforce. Employers may view unauthorized workers as more "denounceable" than their authorized counterparts.[194] Even when ICE audits

189. Shannon Gleeson & Kati L. Griffith, *Employers as Subjects of the Immigration State: How the State Foments Employment Insecurity for Temporary Immigrant Workers*, 46 LAW & SOC. INQUIRY 92, 93–94 (2021) (developing a model to understand how employers become subject to the immigration state using case studies of workers with temporary protected status).

190. *Id.* at 94.

191. *Id.* at 98.

192. *Id.*

193. *E.g.*, Laura E. Schneider & Kimberly A. Parker, *DOJ Civil Rights Division Intensifies Efforts to Investigate Discrimination Against US Workers*, WILMERHALE (Oct. 16, 2017), https://www.wilmerhale.com/insights/client-alerts/2017-10-16-doj-civil-rights-division-intensifies-efforts-to-investigate-discrimination-against-us-workers [https://perma.cc/6LR7-NDTS].

194. Angela D. Morrison, *Why Protect Unauthorized Workers? Imperfect Proxies, Unaccountable Employers, and Anti-discrimination Law's Failures*, 72 BAYLOR L. REV. 117, 125–26 (2021) (citing Sarah B. Horton, *From "Deportability" to "Denounce-ability:" New Forms of Labor Subordination in an Era of Governing Immigration Through Crime*, 39 POLAR 312, 314 (2016)).

a workplace and finds unauthorized workers, the workers are more likely to be subject to criminal and civil penalties than their employers.[195] Employers may view unauthorized workers as "more subservient" and thus less likely to report them for violations of the workers' employment rights.[196] Focusing on immigration enforcement over worker protection, then, may result in employers turning to unauthorized workers because of employers' perceptions of the relative risk.

Ultimately, IER's shift to immigration enforcement signals to employers that it cares more about the restrictions on nonimmigrant work visas than it does about enforcing labor rights. This may lead to more employers refusing to hire noncitizen workers or to hiring unauthorized workers because of perceived lack of comparative risk.

2. Employees

IER's shift to immigration enforcement also has negative signaling effects on employees. The first negative effect is that it may chill workers from filing charges with IER. The second negative effect is that it contributes to a negative stereotype of immigrant workers "stealing" U.S. workers' jobs.

The threat of immigration enforcement chills even authorized workers from complaining about workplace conditions.[197] Indeed, even workers with authorization report workplace problems at reduced rates because they can face "not only job loss, but also loss of a visa and removal from the country" so "workplace claiming becomes even more risky in the transnational labor market in which immigrants work."[198] The risk of a workplace raid that results in worker arrests also can lead to prolonged family separation.[199]

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195. *See id.* at 124–26.

196. *Id.* at 127 (citing Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 970, 976–80 (2006)).

197. *See, e.g.*, Angela D. Morrison, *Executive Estoppel, Equitable Enforcement, and Exploited Immigrant Workers*, 11 HARV. L. & POL'Y REV. 295, 314 (2017).

198. Alexander & Prasad, *supra* note 184, at 1105.

199. Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 UNIV. PENN. L. REV. 1463, 1479–80 (2019). Although Jain primarily focuses on unauthorized immigrants, Jain notes that the same concerns apply to many noncitizens with some form of authorization because their authorization may be temporary or because they can still be subject to removal. *See id.* at 1473.

Moreover, IER's information sharing with immigration enforcement agencies like ICE and the Department of State is likely to chill complaints. IER risks workers seeing the agency as being co-opted by the immigration enforcement regime. This can lead to "system avoidance," which occurs when "institutions . . . are perceived as participating in surveillance."[200] As a result, when IER opts to engage in immigration enforcement it runs the risk of chilling workers' complaints.

IER's focus on employers who hire workers with temporary visas also plays into a narrative in which immigrant workers pose a threat to "'American' jobs."[201] This results in more restrictive immigration laws and more workplace precarity for noncitizen workers.[202] Accordingly, IER's shift to immigration enforcement undermines its worker protection role because it sends negative signaling effects to employers and employees. The next Part describes how IER should exercise its enforcement discretion to avoid immigration enforcement creep.

IV. IER SHOULD EQUITABLY EXERCISE ITS INVESTIGATORY & PROSECUTORIAL DISCRETION

Instead of using its enforcement and investigatory power to engage in immigration enforcement, IER should equitably exercise its discretion to further worker rights. As I have described in prior scholarship in the context of the limits on prosecutorial discretion,[203] equitable enforcement is based on structural and ethical concerns. These concerns, in the context of IER's authority, suggest that IER should focus on protecting noncitizens from the types of discrimination that IRCA's ban on employing unauthorized workers leads to. It should effectively deploy its resources by prioritizing cases involving the most vulnerable workers.

An agency's decision whether to investigate or charge is usually unreviewable; still, structural limits suggest that agencies should

200. *Id.* at 1500–01 (describing "system avoidance" in which individuals forego desirable social interactions with institutions that are perceived as participating in the criminal enforcement regime).

201. *See, e.g.*, Angela D. Morrison, *Framing and Contesting Unauthorized Work*, 36 GEO. IMMIGR. L.J. 651, 660 (2022).

202. *See, e.g.*, Morrison, *supra* note 194, at 138–39.

203. *See* Morrison, *supra* note 197, at 323–25, 327–28.

exercise that discretion equitably.[204] The limits on an agency's enforcement authority originate in separation of powers principles.[205] Investigatory authority, too, has structural limits. Agency civil investigations help agencies fulfill their statutory "mandates."[206] Because of that, "the primary source of an agency's investigative authority is its organic statutes."[207] The structural limits placed on an agency's discretion, then, mean that IER should exercise its investigative and enforcement authority in a manner consistent with congressional intent.

Agency lawyers guide investigations and prosecute claims. They have ethical obligations as lawyers and as government attorneys that serve the public interest.[208] In essence, government lawyers must exercise "public moral judgment."[209] Though the Model Rules of Professional Conduct explicitly mention only criminal prosecutors as having special responsibilities beyond those of other lawyers,[210] ethical norms requiring civil government attorneys to exercise their discretion in the public interest are emanant in the professional rules of conduct and jurisprudence.[211] Further, all government officials have a duty to "faithfully carry out the law."[212] The Department of Justice also recognizes that "public service is a public trust, meaning that the decisions and actions that federal employees take must be made in the best interests of the American

204. *Id.* at 323–25 (first citing Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1044 (2006); then citing Rachel Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 874–75 (2009); then citing Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1320–21 (2010); then citing Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 3 (2009); and then citing Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 286 (2010)).

205. Morrison, *supra* note 197, at 324–25.

206. Aram A. Gavoor & Steven A. Platt, *Administrative Investigations*, 97 IND. L.J. 421, 461 (2022).

207. *Id.* at 436.

208. Morrison, *supra* note 197, at 327; *see also* Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 262-63, 268 (2001).

209. Morrison, *supra* note 197, at 327.

210. MODEL RULES OF PRO. CONDUCT r. 3.8 (Am. Bar Ass'n 2024).

211. *See* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 789 (2000); Bruce A. Green, *Must Government Lawyers Seek Justice in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 257–62 (2000).

212. Green, *supra* note 211, at 275.

people."[213] The ethical norms governing government attorneys and officials mean that IER should protect the most vulnerable workers and enforce IRCA proportionately.

A. *IER Should Exercise Its Authority to Effect Congressional Intent to Protect Noncitizens from Discrimination Resulting from IRCA's Ban on Unauthorized Workers*

To effect Congressional intent, IER should exercise its authority by focusing on discrimination against noncitizens and on employers who engage in unfair documentary practices. Congress included the antidiscrimination provision because of concern that employers would engage in discriminatory hiring practices against work-authorized noncitizens or citizens whom employers perceive as "foreign" due to IRCA's prohibition on hiring unauthorized workers. Congress also ultimately amended the statute to include document discrimination as a form of discrimination under IRCA because of its prevalence after IRCA's enactment. IRCA's antidiscrimination provisions and their subsequent amendments, then, were aimed at addressing new forms of discrimination against noncitizens or perceived noncitizens that IRCA's ban on hiring unauthorized workers would lead to and that Title VII did not address.

1. Congress Intended IRCA to Protect Noncitizens with Employment Authorization from Discrimination

IRCA's antidiscrimination provisions were a key aspect of the legislation to protect authorized noncitizen workers from discrimination that resulted from IRCA's ban on hiring unauthorized workers. Moreover, the provisions were meant to specifically protect noncitizens from discrimination. Congress was not concerned that employers would discriminate against citizens, other than those whom employers perceived as noncitizens. Instead, Congress believed that the ban on employers hiring unauthorized workers would protect U.S. citizen workers. The concern was not with employers hiring noncitizen workers with work visas instead of U.S.

213. JUST. MANUAL § 1-4.010 (DEP'T OF JUST. 2018), https://www.justice.gov/jm/jm-1-4000-standards-conduct [https://perma.cc/9QBM-M4T7] (citing 5 C.F.R. § 2635.101 (2023) (stating the U.S. Government's "Basic obligation of public service" ethics rule)).

citizens but rather employers hiring unauthorized workers or workers whose immigration status prohibited work.

Proponents of IRCA's prohibition on hiring unauthorized noncitizens believed that it was essential to reduce the numbers of individuals living in the United States without immigration authorization.[214] In its report on the legislation, the Senate Judiciary Committee asserted that reducing the "incentive" of employment would reduce extralegal immigration: "only one approach remains: to prohibit the knowing employment of [unauthorized noncitizens]."[215]

Likewise, the House Judiciary Committee believed that IRCA's prohibition on hiring unauthorized noncitizens would lead to less extralegal immigration, including those who worked in violation of their visa status:

> Employment is the magnet that attracts [noncitizens] here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized [noncitizens] and this, in turn, will deter [noncitizens] from entering illegally or violating their status in search of employment.[216]

The proponents of IRCA's ban on unauthorized work argued that unauthorized immigration was undesirable because it "cause[s] economic harm to the directly affected Americans and their families, and in many cases a burden on the taxpayers, but it may also affect society as a whole in the form of social problems associated with unemployment and poverty."[217] They believed that reducing extralegal immigration would lead to more jobs, higher wages, and better working conditions for workers who were U.S. citizens or work-authorized noncitizens.[218] Accordingly, the legislative history shows that Congress enacted the bar on hiring unauthorized workers to reduce extralegal immigration and to address its concern

214. *See, e.g.*, S. REP. NO. 99-132, at 1 (1985) ("The primary incentive for illegal immigration is the availability of U.S. employment. In order to reduce this incentive, the bill makes unlawful the knowing employment, or the recruitment or referral for a fee, of [unauthorized noncitizens]; provides for a system to verify work eligibility; and establishes appropriate penalties for violations.").

215. *Id.* at 1, 8.

216. H.R. REP. NO. 99-682, pt. 1, at 46 (1986).

217. S. REP. NO. 99-132, at 5.

218. *See id.* at 6.

that employers were hiring unauthorized workers to the detriment of U.S. citizen workers and noncitizens with work authorization.

Nonetheless, the legislative history shows a different motivation behind IRCA's antidiscrimination provisions. There, the concern was not with unauthorized workers taking jobs from U.S. citizens; rather, Congress included the antidiscrimination provisions because some members were concerned that IRCA's verification requirements would lead to discrimination against authorized noncitizen workers based on their national origin or perceived immigration status.[219]

At the time of the hearings, there had been reports of employers who, in anticipation of the new employer sanctions, already had made decisions about who to hire or not hire based on their "foreign" appearance or name.[220] Representative Robert Garcia likewise provided instances in which employers discriminated against individuals based on their alienage, including refusing to hire people due to their immigration or citizenship status and requiring employees to submit documents to prove their immigration or citizenship status.[221] The Deputy Mayor of Chicago also reported that Chicago's employment and training office had started to get requests from employers to not send non-U.S. citizens for jobs because they had heard that Congress was going to pass legislation that imposed employer sanctions.[222]

Others disagreed that the new verification requirements would lead to discrimination and opposed the antidiscrimination provisions for that reason.[223] For example, Senator Simpson, in his opening statement to the hearings, stated his opinion that the verification requirements would not lead to discrimination, and in particular, discrimination on the basis of citizenship status:

> I still remain a bit baffled as to exactly how employer sanctions could cause alienage discrimination, something that does not have anything to do with national origin. . . . So certainly, reasonable people

219. *See, e.g.*, Anti-discrimination Provision of H.R. 3080: Joint Hearing Before the Subcomm. on Immigr., Refugees, & Int'l L. of the H. Comm. on the Judiciary & Subcomm. on Immigr. & Refugee Pol'y of the S. Comm. on the Judiciary, 99th Cong. 166 (1985) (testimony of Rep. Robert Garcia, representing Congressional Hispanic Caucus).

220. *See, e.g.*, *id.* at 137–38 (statement of Arthur S. Flemming, Chairman of U.S. Commission on Civil Rights).

221. *Id.* at 166–67 (testimony of Rep. Robert Garcia, representing Congressional Hispanic Caucus).

222. *Id.* at 169 (testimony of Benjamin Reyes, Deputy Mayor, City of Chicago).

223. *E.g.*, *id.* at 2–3 (statement of Sen. Alan Simpson).

> disagree over whether employer sanctions could cause national origin discrimination. I hope we can continue to clarify that through the day, and that every time somebody uses the terms interchangeably we correct them.[224]

By and large, employers also opposed the antidiscrimination provisions.[225]

Discrimination against individuals because they were U.S. citizens did not seem to be a concern of either the proponents or opponents of IRCA's antidiscrimination provisions. In response to a technical question from the Committee, the U.S. Commission on Civil Rights responded, "By definition, a U.S. citizen could not be discriminated against on the basis of alienage (as opposed to national origin), unless, I suppose, there were some question as to whether he or she was a U.S. citizen."[226] But some of the antidiscrimination provision's detractors asserted that employers should be able to prefer United States citizens over work-authorized noncitizens. For example, the following exchange between Representative Mazzoli and William Bradford Reynolds, the then Assistant Attorney General, illustrates that viewpoint:

> [*Representative Mazzoli*:] Do you as an individual, and perhaps the Justice Department as a group, suggest that it is appropriate for an employer to have a policy to say, "We only want to hire U.S. citizens; we're not against you because you're black, or because you're brown, or because you come from Afghanistan or Mali or wherever, but we just want to hire U.S. people. There's a lot of unemployment, and we want to give preference on jobs to U.S. people. So you're standing before me, you're a permanent resident [noncitizen], legally in this Nation, legally able to work, but I want to give the job to the guy standing next to you." I wonder, how do you react to that?
>
> [*William Bradford Reynolds*:] Well, I think that philosophically—I think there certainly is something to be said for an employer, and I think there is nothing that is wrong with an employer having that view in terms of his employment determinations. It seems to me that we have protections that are well-built into the law, which do not allow for those kinds of sentiments to serve as a pretext for discrimination on a national origin basis. I think that those protections are ones that provide an ample opportunity to prevent the kind of situation that

224. *Id.* at 2 (statement of Sen. Alan Simpson).

225. *See, e.g.*, *id.* at 70–73, 77–78, 81–83, 85–86 (statement of Kathleen Alexander, Vice President of Personnel Services, Marriot Corporation, on behalf of the U.S. Chamber of Commerce); *id.* at 87–92 (statement of Pat Choate, Director of Policy Analysis, TRW Inc., on behalf of the National Association of Manufacturers).

226. *Id.* at 247, 253–54 (statement of Clarence Pendleton, Jr., Chairman, U.S. Commission on Civil Rights).

> seems to be at the heart of most of the concern that has been registered about this immigration bill.[227]

Though some witnesses and Congressional members believed the best way to provide protection against alienage discrimination would be to amend Title VII, they believed that they would not be able to successfully amend it.[228] Including immigration status discrimination in IRCA, then, was a compromise.

Both the Senate Judiciary Committee and House Judiciary Committee agreed that it was necessary to bar employers from hiring unauthorized noncitizens, but the two committees disagreed that the prohibition would lead to discrimination. The Senate Judiciary Committee believed that discrimination would not occur because the provision only required employers to ensure that any documents reasonably appeared on their face to be genuine, protecting innocent employers who tried to comply with the statute.[229] According to the Committee, this would result in employers being unafraid to employ individuals if they have documents verifying their work-authorized status.[230]

The House Judiciary Committee supported the inclusion of the antidiscrimination provisions.[231] In particular, it supported the inclusion of the immigration status discrimination provisions because Title VII does not prohibit discrimination on that basis:

> It makes no sense to admit immigrants and refugees to this country, require them to work and then allow employers to refuse to hire them because of their immigration (non-citizenship) status. Since Title VII

227. *Id.* at 199 (testimony of William Bradford Reynolds, Assistant Att'y Gen., on behalf of the Civil Rights Division of the Department of Justice).

228. *See, e.g.*, *id.* at 228–32 (testimony of Paul Grossman, with statements by Rep. Howard Berman, and Rep. John Bryant). A version of this view also came from members opposed to the alienage discrimination provisions because they believed that Title VII's prohibition on national origin discrimination sufficiently protected workers. For example, the minority members on the House Committee on Education & Labor opposed the inclusion of the antidiscrimination measures and creation of the Office of Special Counsel because, in their view, Title VII already protected authorized workers from discrimination and the EEOC was best suited to enforce antidiscrimination laws. H.R. REP. NO. 99-682, pt. 2, at 46–47 (1986) (minority views). They viewed the provisions as adding unnecessary bureaucratic burdens and unnecessary burdens on employers. *Id.*

229. S. REP. NO. 99-132, at 9 (1985); *see* Immigration Reform and Control Act of 1986, Pub L. No. 99-603, § 101, 100 Stat. 3359, 3359–62.

230. S. REP. NO. 99-132, at 8–9 (1985). The Reagan administration also opposed the inclusion of the antidiscrimination provisions: "The bill's provisions prohibiting discrimination on the basis of citizenship are extremely ill-advised. There is no record that discrimination on the basis of alienage or citizenship is a significant problem, or will be one if this legislation is enacted." H.R. REP. NO. 99-682, pt. 1, at 110 (1986).

231. H.R. REP. NO. 99-682, at 68.

> does not provide any protection against employment discrimination based on alienage or non-citizen status, the Committee is of the view that the instant legislation must do so.[232]

Ultimately, in conference, Congress went with the House's inclusion of antidiscrimination provisions because the majority of members believed that antidiscrimination protections helped protect workers whom employers might not hire because the employer feared sanctions.[233]

2. Congress Added the Provision Protecting Workers from Unfair Document Practices Because in the Immediate Aftermath of IRCA, Studies Showed that Employers Were Discriminating Against Noncitizens in the Verification Process

The prohibition on unfair documentary practices was similarly aimed at protecting noncitizens and those whom employers perceived as noncitizens from discrimination. At the time of IRCA's passage, many proponents of the antidiscrimination provisions were concerned with unfair documentary practices.[234] Specifically, the proponents feared employers would require passports or other

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232. *Id.* at 70. The House Committee on Education & Labor also supported the antidiscrimination provisions because it feared the impact that the employer sanctions could have on employer willingness to hire people who were work authorized but not citizens or who appeared foreign. H.R. REP. NO. 99-682, pt. 2, at 12 (1986). The Committee explained, "It is the committee's view that if there is to be sanctions enforcement and liability there must be an equally strong and readily available remedy if resulting employment discrimination occurs." *Id.* It also believed that Title VII's national origin provision was "inadequa[te] . . . to protect individuals from the potential act of discrimination that may uniquely arise from the imposition of sanctions" because Title VII only covered employers with 15 or more employees. *Id.* It also noted the Supreme Court of the United States's holding in *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973) "that while all individuals including aliens are protected from discrimination based on race, color, religion, sex or national origin, there is nothing in Title VII which protects any person from discrimination based on alienage/citizenship." *Id.*

233. The Conference Report stated the following:

> The antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in this context. The bill broadens the Title VII protections against national origin discrimination, while not broadening the other Title VII protections, because of the concern of some Members that people of "foreign" appearance might be made more vulnerable by the imposition of sanctions. While the bill is not discriminatory, there is some concern that some employers may decide not to hire "foreign" appearing individuals to avoid sanctions.

H.R. REP. NO. 99-1000, at 87 (1986) (Conf. Rep.).

234. *See, e.g.*, Anti-discrimination Provision of H.R. 3080: Joint Hearing Before the Subcomm. on Immigr., Refugees, & Int'l L. of the H. Comm. on the Judiciary & Subcomm. on Immigr. & Refugee Pol'y of the S. Comm. on the Judiciary, 99th Cong. 136, 280–82 (1985) (statement of Arthur S. Flemming, former Chairman, U.S. Comm. on Civil Rights).

proof of citizenship instead of relying on the documents allowed as proof of work authorization for noncitizens.[235] Arthur Fleming, the former chairperson of the U.S. Commission on Civil Rights, illustrated the possibilities he saw for document discrimination by giving examples of four types of employers:

> a. The Unknowledgeable Employer. This is a person who has an indirect knowledge about employer sanctions for hiring undocumented [nonctizens], but is ignorant of the specific provisions. This employer is likely to avoid running afoul of the law as he perceives it by playing it safe and favoring applicants not likely to be within the provisions of the law, i.e., non-Hispanic, and non-"foreign," (i.e., foreign looking or sounding persons) and documents most likely to be authentic, e.g., passports.
> b. The Wary Employer. This is a person who is knowledgeable about the law and is wary of being caught in its net by not meeting the verification requirements which provide that an accepted document "reasonably appears on its face to be genuine." This person's hiring practices behavior will be similar to that of the unknowledgeable employer.
> c. The Lazy Employer. This is a person who does not want to take the trouble to meet the compliance requirements of the law. He, too, will discriminate against Hispanics or "foreigners" because it is more likely that his verification and record-keeping procedures will be subject to official scrutiny if he hires Hispanics or "foreigners."
> d. The Bigot. This is a person who was inclined to discriminate before the passage of the Act and after the enactment of the law has greater reason to do so. He can in "good faith" reject tendered documents such as social security cards by stating that there is no way to determine their genuineness. Accordingly, like the Unknowledgeable Employer, he will require documents that are less likely to be forged, e.g., passports.[236]

Accordingly, the main concern was that employers would reject noncitizens or those who looked "foreign" because they did not present a passport, a document associated with U.S. citizenship. Nonetheless, Congress did not include unfair documentary practices as a form of discriminatory practices when it passed IRCA in 1986.[237]

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235. *Id.* at 281.

236. *Id.* at 281–82.

237. *See* Immigration Reform and Control Act of 1986, Pub L. No. 99-603, §§ 101–103, 100 Stat 3359 (1986).

Subsequently, Congress amended the statute in 1990 to include unfair documentary practices in response to reports from the General Accounting Office ("GAO") that widespread discrimination had occurred as a result of IRCA's employer sanctions provisions.[238] The GAO estimated that ten percent of the employers (461,000) it surveyed (4.6 million) had engaged in national origin discrimination.[239] Of the 461,000 employers who reported practices that constituted national origin discrimination, 227,000 began the discriminatory practice as a result of IRCA.[240]

The GAO also reported that IRCA resulted in citizenship status discrimination.[241] It estimated that nine percent of employers (430,000) said that they only hired workers born in the United States or refused to hire noncitizens with temporary work documents because of IRCA.[242] Congress also amended the statute to prohibit retaliation and intimidation.[243]

In 1996, as a result of employer lobbying, Congress weakened the provision prohibiting unfair documentary practices and the sanctions for employers who knowingly hire unauthorized employees.[244] When Congress passed the provision prohibiting unfair documentary practices, it did not require that the employer engage in document discrimination for the purpose or intent of discriminating against an individual because of the individual's national origin or citizenship status.[245] The 1996 amendment only classifies document discrimination as unlawful if motivated by national origin or citizenship status.[246]

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238. Immigration Act of 1990, Pub. L. No. 101-649, § 535, 104 Stat. 4978, 5055 (1990) (codified as amended at 8 U.S.C. § 1324b(a)(6)); U.S. GEN. ACCT. OFF., GAO/GGD-90-62, REPORT TO THE CONGRESS, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 3–4 (1990).

239. U.S. GEN. ACCT. OFF., *supra* note 238, at 5–6.

240. *Id.*

241. *Id.* at 7.

242. *Id.*

243. Immigration Act of 1990, Pub. L. No. 101-649, § 534, 104 Stat. 4978, 5055 (1990) (codified as amended at 8 U.S.C. § 1324b(a)(5)).

244. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 411, 421, 110 Stat. 3009-546, -666, -670 (codified as amended at 8 U.S.C. §§ 1324a(b)(6), 1324b(a)(6)); Leticia M. Saucedo, *The Making of the "Wrongfully" Documented Worker*, 93 N.C. L. REV. 1505, 1514 (2013).

245. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 535, 104 Stat. 4978, 5055.

246. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 421, 110 Stat., 3009-546, -670 (codified as amended at 8 U.S.C. § 1324b(a)(1), (6)).

Congress also included a new provision that protects employers from sanctions for hiring or continuing to employ someone who lacks employment authorization, if the employer made "a good faith attempt to comply with the requirement."[247] But even though Congress weakened the protections for workers and strengthened the protections for employers, it still retained document discrimination as a prohibited unfair immigration-related employment practice.[248] As the legislative history demonstrates, the underlying concern was not that employers would discriminate against U.S. citizens, but instead against noncitizens or citizens whom employers perceived as noncitizens.

* * *

In sum, the legislative history of IRCA and Congress's subsequent amendments show four things. First, Congress believed the antidiscrimination provisions in IRCA were necessary to counter potential discrimination resulting from employers' hiring practices in response to IRCA's prohibition on hiring unauthorized workers. Second, while Congress was concerned with discrimination on the basis of national origin discrimination, it also included a prohibition on discrimination based on citizenship status because it hoped to deter employers from refusing to hire workers who were not United States citizens. Third, Congress viewed document discrimination as a form of discrimination uniquely tied to IRCA's employer sanctions and hoped to deter employers from engaging in document discrimination. Fourth, and most importantly, Congress was most concerned with discrimination against noncitizens or those whom employers believed to be noncitizens.

Accordingly, the structural limits on IER's enforcement authority dictate IER should use its authority to investigate and pursue cases in which employers discriminate against noncitizens. As shown above, the primary concern of Congress when it passed the citizenship and national origin antidiscrimination provisions was that employers would refuse to hire individuals because they were noncitizens or appeared "foreign." Ultimately, Congress included unfair documentary practices because employers were screening out noncitizens during the employment verification process. IRCA's antidiscrimination provisions were not intended to be yet another mechanism of immigration enforcement, they were meant

247. § 411, 110 Stat. 3009-666 (codified as amended at 8 U.S.C. § 1324a(a)(6)(A)).
248. § 421, 110 Stat., 3009-670 (codified as amended at 8 U.S.C. § 1324b(a)(6)).

to protect noncitizen workers from immigration enforcement overreach.

B. *The Ethical Norms Guiding Lawyers and Government Employees Suggest That IER Should Focus on the Most Vulnerable Workers and Enforce IRCA Proportionately*

Ethical norms dictate that IER lawyers exercise moral judgment and that all IER employees faithfully carry out the law. Because IRCA's antidiscrimination provisions rely on workers coming forward to report violations, IER must ensure that its actions do not chill worker complaints. Likewise, as discussed above, IRCA's antidiscrimination provisions were designed to protect the rights of the individuals most impacted by IRCA's ban on unauthorized employment. This means IER should ensure that it protects the most vulnerable workers. Moreover, because IER acts in the public interest, its enforcement of IRCA should be proportional to ensure that its activities do not have unintended immigration consequences.

Just as other federal antidiscrimination in employment statutes include retaliation provisions as a key enforcement mechanism, so does IRCA.[249] Anti-retaliation provisions ensure the effective enforcement of antidiscrimination statutes because they allow workers to come forward and report violations free from negative consequences.[250] Nonetheless, despite antiretaliation provisions, vulnerable workers often are chilled from complaining about workplace violations.[251]

In the context of other federal antidiscrimination statutes, the Supreme Court has highlighted the need to protect the rights of the most vulnerable workers to effect the intent of the antidiscrimination statute. For example, when the Court determined that retaliatory action encompasses employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," the Court took pains to describe how different workers might have different vulnerabilities that courts

249. 8 U.S.C. § 1324b(a)(5).

250. *See* Morrison, *supra* note 197, at 311–15 (surveying the retaliation provisions in federal workplace laws).

251. *See* Alexander & Prasad, *supra* note 184, at 1072; Kati L. Griffith & Shannon M. Gleeson, *The Precarity of Temporality: How Law Inhibits Immigrant Worker Claims*, 39 COMP. LAB. L. & POL'Y J. 111, 112 (2017).

should consider.[252] The Court noted that a change in schedule may not be a problem for one worker, "but may matter enormously to a young mother with school age children."[253] Similarly, in *Johnson v. Transportation Agency*, the Court found the employer did not discriminate against a male employee based on his sex when it considered a female employee's sex when promoting her.[254] The Court reasoned that because the employer had "identified a conspicuous imbalance in job categories traditionally segregated by race and sex," the employer's promotion plan was "fully consistent with Title VII, for it embodie[d] the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace."[255]

Accordingly, because antidiscrimination statutes rely on workers to come forward to report violations, agencies that enforce those statutes need to ensure that the most vulnerable workers are not chilled from bringing claims. Moreover, agencies should enforce antidiscrimination in employment statutes to protect the people who are most vulnerable in the workplace. For IER, this means that the agency should focus on protecting not just noncitizen workers but also, where possible, those noncitizen workers with the most precarious status.

"Equity mitigates the effect of overly broad, punitive, and inflexible statutes in ways that help ensure the law is fair and proportional in its application to individual human beings."[256] Because the information that IER collects during its investigations can be used to criminally prosecute employers and their employees, or could lead to noncitizen workers being deported, the agency should exercise caution. Civil agency investigations can lead to parallel criminal prosecutions.[257] Agencies generally have unfettered investigatory power in the civil context, so there is a risk that agencies can use that information unfairly in a criminal prosecution.[258] And though immigration removal proceedings are civil, the same

252. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68–69 (2006).
253. *Id.* at 69.
254. 480 U.S. 616, 641–42 (1987).
255. *Id.* at 640, 642.
256. Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 664–65 (2015).
257. Gavoor & Platt, *supra* note 206, at 464.
258. *See id.* at 463–64.

concerns with abuse exist because of the severity of deportation.[259] This principle, proportionality, means that IER should exercise caution when it engages in activities that touch on immigration enforcement or avoid them altogether.

C. *IER Should Adjust Its Enforcement Activities to Better Exercise Its Enforcement Authority Equitably*

As described in Part II, above, the last decade has seen IER's enforcement activities shift from protecting workers to immigration enforcement.[260] And that creep towards immigration enforcement has had consequences.[261] To avoid those negative consequences, IER should adjust its enforcement activities to ensure that it is exercising its enforcement authority equitably. This means it should exercise its authority consistent with the statute to protect noncitizen workers, focus on the most vulnerable workers, and ensure its enforcement efforts are proportional—that is, by engaging fairly in worker protection and avoiding immigration enforcement.

Instead of focusing on employers who hire temporary workers, IER should focus on employers who discriminate against the workers Congress intended the IRCA's antidiscrimination provisions to protect—noncitizens and those whom employers perceive as noncitizens. Besides devoting resources to citizenship status discrimination against noncitizens, IER should move back towards enforcing IRCA's prohibition on unfair documentary practices.

IER's focus on employers who hire temporary workers instead of protecting the most vulnerable workers has harmed authorized workers with the most precarious status. First, most of the temporary work visas tie the noncitizen to the sponsoring employer, which leads to greater vulnerability for the worker.[262] Second, the reallocation of resources to immigration enforcement has meant

259. *See* Fong Yue Ting v. United States, 149 U.S. 698, 740 (1983) (Brewer, J., dissenting) ("Deportation is punishment. It involves first an arrest, a deprival of liberty; and, second, a removal from home, from family, from business, from property."); *see also* Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010) (recognizing that although deportation is civil in nature, it is "particularly severe" and "intimately related to the criminal process").

260. *See supra* Part II.

261. *See supra* Part III.

262. *See, e.g.*, Maria L. Ontiveros, *H-1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers*, 38 BERKELEY J. EMP. & LAB. L. 1, 9, 14, 23–24, 26 (2017).

that IER has engaged in fewer telephone interventions.[263] Because the telephone interventions often address issues those workers with the most vulnerable types of status have (TPS, DED, or other liminal or temporary visa statuses), the move away from telephone interventions means the most vulnerable workers are not getting assistance, despite their work authorized status. Ultimately, leaving those workers without protection will lead to fewer reports of violations of the statute.

Finally, IER's direct engagement and information sharing with immigration enforcement agencies not only runs the risk of deterring reporting, but also violates proportionality norms. One proportionality problem is that it leads to unfair overenforcement against both employers and employees.[264] IER's participation in the immigration enforcement regime can result in multiple agencies charging or fining employers or employees.[265] Moreover, for vulnerable employees, there is an added risk: deportation. For example, even workers with employment authorization can face deportation if it turns out their employer misrepresented the need for the worker on immigration paperwork.[266] These proportionality concerns, then, mean that IER should avoid the creep towards immigration enforcement and limit its information sharing with immigration enforcement agencies.

CONCLUSION

The last decade has seen immigration enforcement creep at IER. IER has moved away from investigating and enforcing cases that involve discrimination against noncitizen workers, particularly those with the most vulnerable status. Instead, it has focused its efforts on prosecuting cases against employers who hire workers with temporary work visas and has entered into agreements to share information with immigration enforcement agencies. These

263. *See supra* Section II.A.3.

264. *See* Gavoor & Platt, *supra* note 206, at 464. Gavoor and Platt explain that "[i]n the aggregate, regulatory overlap creates redundancy, which increases the cumulative cost of agency action." *Id.* They argue the same should hold true for investigations. *Id.* The overlap in investigations "faces an additional problem: 'multiple potential enforcers who undoubtedly already have jurisdiction over an issue might have incentives to show enforcement zeal, even if duplicating others' efforts.'" *Id.* at 464–65 (quoting William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 29 (2003)).

265. *Id.* at 464.

266. *See* Ontiveros, *supra* note 262 at 9, 24.

activities lead to more immigration enforcement rather than to worker protection.

IRCA's statutory history suggests that IER should focus on the new forms of discrimination caused by IRCA's bar on unauthorized work. In particular, to effectively protect workers IER should focus on discrimination against noncitizens. Likewise, IER's mandate to act in the public interest means that it should exercise its investigatory and enforcement discretion equitably. That means avoiding the overenforcement of laws aimed at immigration control and instead focusing on the most vulnerable workers.

APPENDIX A

Notes on Figure 1:

"Unauthorized Workers": I use the term "unauthorized workers" to include any noncitizens who are not authorized to work. They could be individuals who are in the United States with a nonimmigrant visa that does not authorize employment, or individuals who are in the United States without any authorized immigration status. 8 U.S.C. § 1324a(h)(3) (defining "unauthorized [noncitizens]" as those who are not United States citizens or nationals, legal permanent residents, or otherwise authorized to work). Although Title VII protects unauthorized workers from discrimination based on national origin status, the workers' unauthorized status operates to limit their remedies. Angela D. Morrison, *Framing and Contesting Unauthorized Work*, 36 GEO. IMMIGR. L.J. 651, 667–69, 671–72 (2022). And to the extent the claim was based on discrimination in hiring or recruiting, instead of termination or the terms and conditions of employment, it is likely the claim would fail because some courts have held that noncitizens without immigration status cannot be qualified for the job since they lack legal authorization to work. *See, e.g.*, Egbuna v. Time-Life Librs., Inc., 153 F.3d 184, 187–88 (4th Cir. 1988).

"Work-Authorized Workers with Liminal Immigration Status": I use the term "work-authorized workers with liminal status" to refer to people who do not have legal immigration status but nonetheless have work authorization. Liminal legality is a term that sociologist Cecilia Menjívar used to describe the status of noncitizens who are in the United States with some form of administrative agreement not to remove them but "without access to the same rights of individuals lawfully present on nonimmigrant or immigrant visas." Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 715 (2015) (citing Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999 (2006)). Menjívar looked at liminality in the context of Guatemalan and El Salvadorean migrants who had temporary protected status (TPS). Menjívar, *supra*. TPS allows a noncitizen already in the United States to remain in the United States without a formal immigration status because of emergent conditions in their country of origin; it is based on the conditions in the home country, such as a natural disaster, not on the individual circumstances of the noncitizen. 8 U.S.C. § 1254a.

And it allows the noncitizen to attain work authorization. § 1254a(a)(1)(B). Another example of this category of worker are individuals with DACA (Deferred Action for Childhood Arrivals). 8 C.F.R. § 274a(c)(14) (providing for work authorization for individuals with deferred action). The state has agreed not to remove noncitizens with DACA and to authorize their employment but has not granted them any form of immigrant or nonimmigrant status.

"Work-Authorized Nonimmigrants": I use the term "work-authorized nonimmigrants" to refer to people who have been admitted on a nonimmigrant visa that allows them to work. In general, nonimmigrants are any noncitizens who are applying for a visa or admitted with a visa and are not legal permanent residents or asylees/refugees. §§ 1101(a)(22), (a)(42). This includes people who enter the United States on a tourist visa or through the visa waiver program, § 1101(a)(22)(B), who come to the United States on a temporary work visa, §§ 1101(a)(22)(H), (L) & (O), who come to the United States on various educational, cultural, and student visas, §§ 1101(a)(22)(F), (J), (M), (P) & (Q), who come to the United States to join family members who are United States citizens or legal permanent residents, §§ 1101(a)(22)(K) & (V), or who were the victims of crimes, trafficking, or assisted law enforcement, §§ 1101(a)(22)(S), (T) & (U). Some nonimmigrant visas authorize the noncitizen to work in connection with the visa, but others do not. *See, e.g.*, 8 C.F.R. § 274a.12(a)(6) (fiancé or fiancée nonimmigrant visa); 8 U.S.C. § 1101(a)(22)(H) (nonimmigrant work visa); or 8 C.F.R. § 274a.(a)(19) (U nonimmigrant visa).

Title VII Protection from Unfair Documentary Practices for Unauthorized Workers: Though Title VII covers unfair documentary practices motivated by national origin discrimination, employers generally only check employees' documents at the hiring stage, so unauthorized workers would have a difficult time showing that they were qualified for the job. *See* Morrison, *supra*, at 671–72. Nonetheless, if the unfair documentary practice occurred later in employment and not in response to an audit by Immigration and Customs Enforcement, an unauthorized worker could state a claim but the worker's remedies would be limited. *Id.*

APPENDIX B

Breakdown of backpay funds by administration, type of claim, and amount:

Biden administration:

2 CS (US workers)=average $38,410

1 CS (non-USCs)=average $70,000

2 unfair documentary practices=average $85,000

Trump administration:

2 CS (US workers)=average $82,500

2 CS (non-USCs)=average $62,500

2 unfair documentary practices=average $100,000

Obama administration:

2 CS (US Workers)=average $161,500

10 unfair documentary practices=average $57,759