


# Memorandum



97-2

Subject  Anti-discrimination in Employment - Responsibilities of Federal Contractors	Date  APR 2 1997
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To  
  
Bureau Procurement Chiefs

From  
  
Janis A. Spasato  
Procurement Executive

I am attaching a memorandum dated January 17, 1997, co-signed by officials of the Equal Employment Opportunity Commission, the Department of Labor (Office of Federal Contract Compliance Programs), and the Department of Justice (Civil Rights Division), organizations that have enforcement responsibilities under certain anti-discrimination provisions of Federal law. The memorandum explains that while Executive Order No. 12989, issued in February 1996, strengthens enforcement of certain immigration laws, it does not relieve Federal contractors and Government contracting personnel from full compliance with Federal anti-discrimination requirements.

The primary purpose of Executive Order No. 12989 is to promote economy and efficiency in Government procurement, by providing for the debarment of Federal contractors who knowingly hire unauthorized workers, in violation of the employer sanctions provisions of the Immigration Reform and Control Act of 1996 (IRCA). The January 17, 1997 memorandum calls attention to the fact that, while the thrust of Executive Order 12989 is to promote economy and efficiency in Government procurement, the Order makes clear that Federal protections against unlawful employment discrimination remain a critical objective of the Government. Employer discrimination by Federal contractors against legal workers will not be tolerated. Federal contractors remain obligated to comply with the anti-discrimination requirements of IRCA as well as those of all other applicable laws.

Therefore, in complying with IRCA's prohibition against employing unauthorized workers, employers may not lawfully single out or otherwise treat individuals differently because they are foreign born, "foreign-looking," have "foreign sounding names" or have accents. All employers must identify and review work authorization documents for all newly hired employees, not just those who appear to be foreign or whose primary language is not

English. In this regard, Federal contractors also may not impose additional or different documentation requirements on non-citizens or on foreign-looking applicants (such as refusing to accept anything but a so-called "green card" as proof of work authorization, which would constitute not only document abuse but also citizenship status discrimination against protected persons who are not permanent resident aliens). Such examples of disparate treatment should be avoided because they violate one or more of the following: IRCA's anti-discrimination provisions; prohibitions against national origin discrimination in Title VII of the Civil Rights Act of 1964; and prohibitions against national origin discrimination in Executive Order 11246, Equal Opportunity in Federal Employment.

The memorandum contains addresses and telephone numbers at all three Federal agencies mentioned above that may be contacted for information or assistance in interpreting the anti-discrimination requirements discussed in the memorandum.

Please ensure that all Federal contractors with whom you contract are made aware not only of the need to comply with IRCA's employment provisions or risk debarment, but also of the concomitant need to comply with IRCA's anti-discrimination requirements and those of other applicable laws.

If you have any questions on these anti-discrimination provisions, please call Larry Silvis on (202) 616-3754.

Attachments

U. S. Equal Employment  
Opportunity Commission



Equal Employment Opportunity  
Commission

Washington, D. C. 20507

U. S. Department of Justice



Office of the Assistant Attorney General  
Civil Rights Division

Washington, D. C. 20538-7728

U. S. Department of Labor

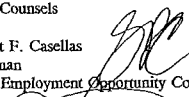



Office of the Federal Contract  
Compliance Programs


Washington, D. C. 20210

MEMORANDUM

TO: Federal Agency Heads  
General Counsels  
Legal Counsels

FROM: Gilbert F. Casellas   
Chairman  
Equal Employment Opportunity Commission

Deval L. Patrick   
Assistant Attorney General for the Civil Rights Division  
United States Department of Justice

Shirley J. Wilcher   
Deputy Assistant Secretary  
Office of Federal Contract Compliance Programs  
United States Department of Labor

DATE: January 17, 1997

SUBJECT: Executive Order 12989, Debarment of Federal Contractors Who Knowingly  
Employ Unauthorized Workers

On February 13, 1996, President Clinton signed Executive Order No. 12989, 61 Fed. Reg. 6091 (1996), pertaining to the debarment of federal contractors who knowingly hire unauthorized workers in violation of the employer sanctions provisions of the Immigration Reform and Control Act of 1986, as amended (IRCA).<sup>1</sup> For your reference, a copy of the order is attached.

The purpose of this memorandum is two-fold. First, we wish to call your attention to the fact that, while the thrust of the Executive Order is to promote economy and efficiency in

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<sup>1</sup> IRCA is an amendment to the Immigration and Nationality Act of 1952, as amended (INA), 8 U.S.C. § 1101 *et seq.* The IRCA employment provisions at issue are at 8 U.S.C. § 1324a(a)(1)(A) and (a)(2).

government procurement, the Order makes clear (as does the President's accompanying statement) that strengthened enforcement of the immigration laws and federal protections against unlawful employment discrimination based on national origin, citizenship status, or other immigration related unfair employment practices (e.g., document abuse and retaliation) are both viewed as critical objectives.

Simply put, employment discrimination by federal contractors against legal workers will not be tolerated. Thus, federal contractors remain obligated to comply with IRCA's anti-discrimination requirements as well as with those of all other applicable laws, including Title VII of the Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. § 2000e *et seq.*, and Executive Order 11246, as amended, 30 Fed. Reg. 12319 (September 29, 1965), Executive Order 11375, 32 Fed. Reg. 14303 (October 13, 1967); Executive Order 11478, 34 Fed. Reg. 12985 (September 8, 1969); and Executive Order 12086, 43 Fed. Reg. 46501 (October 5, 1978).<sup>2</sup>

The second purpose of this memorandum is to ask your agency, in its role as a contracting authority, to ensure that federal contractors with whom you contract are made aware not only of the need to comply with IRCA's employment provisions or risk debarment, but also of the concomitant need to comply with IRCA's anti-discrimination requirements and those of other applicable laws. In your discretion, this information may be disseminated by your agency's procurement officials or otherwise.

#### A. IRCA'S ANTI-DISCRIMINATION PROVISIONS

The Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), a component of the Department of Justice's Civil Rights Division, is responsible for enforcement of IRCA's anti-discrimination provisions, which are a counter-balance to the unintended but possible consequences of the employer sanctions provisions of IRCA. Complaints alleging IRCA employment-related discrimination can be filed with the Office of Special Counsel at the address below.

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<sup>2</sup> Section 1(b) of the Executive Order 12989 specifically provides that nothing contained in the order relieves employers of their obligation to avoid unfair immigration-related employment practices as required by IRCA at 8 U.S.C. § 1324b (including the documentary practices prohibited by § 1324b(a)(6)) or to comply with all other anti-discrimination requirements of applicable law.

IRCA's anti-discrimination provisions, which apply to employers with four or more employees, cover four distinct types of discrimination: national origin discrimination, citizenship status discrimination, document abuse, and intimidation/coercion/retaliation.

With respect to national origin, IRCA makes it unlawful for an employer not covered by Title VII (i.e., an employer with four to fourteen employees or one specifically exempted from Title VII) to discriminate against an individual on the basis of his or her national origin in hiring, discharge, or recruitment or referral for a fee. 8 U.S.C. § 1324b(a)(1)(A).

With respect to citizenship status, IRCA prohibits a covered employer from discriminating against U.S. citizens and nationals, or other protected individuals (generally, immigrants with work authorization) on the basis of their citizenship status in hiring, discharge, or recruitment or referral for a fee.<sup>3</sup> 8 U.S.C. § 1324b(a)(1)(B).

IRCA also prohibits covered employers from engaging in document abuse (that is, from requiring more or different documents than are specified by IRCA for purposes of verifying an individual's employment eligibility, or from refusing to honor documents that reasonably appear to be genuine). 8 U.S.C. § 1324b(a)(6).

Finally, intimidation, coercion, threats or retaliation against any individual for purposes of interfering with any right or privilege secured under IRCA or filing a complaint or charge with OSC are also prohibited under IRCA as discriminatory practices. 8 U.S.C. § 1324b(a)(5). Under IRCA, all these forms of discrimination are considered unfair immigration-related employment practices.<sup>4</sup>

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<sup>3</sup> The term "protected individual" is defined at 8 U.S.C. § 1324b(a)(3). In addition to U.S. citizens and nationals, the term generally includes (subject to specified exceptions) permanent resident aliens, certain aliens lawfully admitted for temporary residence, refugees, and aliens granted asylum.

Although U.S. citizens are covered by IRCA's protections against citizenship status discrimination, such discrimination is, as a general matter, more frequently directed at aliens.

<sup>4</sup> See also IRCA regulations at 28 C.F.R. Part 44.

## B. TITLE VII AND EXECUTIVE ORDER 11246

Federal law provides additional safeguards against employment discrimination that may result from employer efforts to avoid sanctions associated with hiring unauthorized workers.

Title VII of the Civil Rights Act prohibits employment discrimination based on an individual's race, color, religion, sex or national origin by non-exempt employers with fifteen or more employees. 42 U.S.C. Sec. 2000e, 2000e-2. The EEOC is primarily responsible for the enforcement of Title VII of the Civil Rights Act of 1964, as amended. Persons who believe that they have been discriminated against under Title VII may file a charge of discrimination with the appropriate EEOC office or call the number below for further information.

Executive Order 11246 prohibits employment discrimination based on an individual's race, color, religion, sex or national origin by non-exempt federal contractors or subcontractors with contracts in excess of \$10,000. See 41 C.F.R. 60-1.4 and 60-1.5. The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) is responsible for enforcement of Executive Order 11246, as amended. Persons who believe that they have been discriminated against under Executive Order 11246 may file a charge of discrimination with the appropriate Regional OFCCP office or call the number below for further information.

Although neither Title VII nor Executive Order 11246 specifically prohibits discrimination based on an individual's citizenship, both Title VII and Executive Order 11246 prohibit practices and policies that have the purpose or effect of discriminating on the basis of national origin. Unlike IRCA, which applies only to hiring, discharge, and recruitment or referral for a fee, Title VII and Executive Order 11246 apply to all aspects of the employment relationship, including terms, conditions, and privileges of employment. Like IRCA, Title VII and Executive Order 11246 also prohibit retaliation for opposing unlawful employment practices or participating in protected activity (such as filing a charge of discrimination or testifying in a Title VII or Executive Order 11246 investigation or hearing).

Therefore, in complying with IRCA's prohibition against employing unauthorized workers, employers may not lawfully single out or otherwise treat individuals differently because they are foreign born, "foreign-looking", have "foreign-sounding names" or have accents. Nor may they refuse to hire or to recruit or refer for a fee individuals because of their national origin, immigration

status, or type of working papers as long as the person is legally authorized to work in the United States.<sup>5</sup>

For example, in complying with IRCA's employment eligibility verification requirements, all employers must identify and review work authorization documents for all newly hired employees, not just those who appear to be foreign or whose primary language is not English. In this regard, federal contractors also may not impose additional or different documentation requirements on non-citizens or on foreign-looking applicants (e.g., refusing to accept anything but a so-called "green card" as proof of work authorization, which would constitute not only document abuse but also citizenship status discrimination against protected persons who are not permanent resident aliens). Such examples of disparate treatment should be avoided because they violate IRCA's anti-discrimination provisions, Title VII or Executive Order 11246's prohibitions against national origin discrimination, or in many cases, more than one of these laws.

For additional information or assistance in interpreting the anti-discrimination requirements under IRCA, Title VII or Executive Order 11246, you may contact:

IRCA

U.S. Department of Justice  
Office of Special Counsel for Immigration-Related Unfair  
Employment Practices  
Post Office Box 27728  
Washington, D. C. 20038-7728  
Telephone: (800) 255-7688 (employee inquiries)  
(800) 255-8155 (employer inquiries)

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<sup>5</sup> It is permissible under IRCA to discriminate on the basis of citizenship status where required in order to comply with law, regulation, executive order, or federal, state, or local government contract, or where determined essential for purposes of doing business with a federal, state, or local government agency or department. 8 U.S.C. § 1324b(a)(2)(C). IRCA also permits an employer to prefer a U.S. citizen or national over another individual who is not a U.S. citizen if the two are equally qualified. Id. at § 1324b(a)(4).

Title VII

U.S. Equal Employment Opportunity Commission  
Office of Legal Counsel  
1801 L Street, N.W.  
Washington, D. C. 20507  
Telephone: (202) 663-4900

Executive Order 11246

U.S. Department of Labor  
Office of Federal Contract Compliance Programs  
Room C-3325  
200 Constitution Avenue, N.W.  
Washington, D. C. 20210  
Telephone: (202) 219-9475

Attachment



# Federal Register

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Thursday  
February 15, 1996

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## Part IV

### The President

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Executive Order 12989—Economy and  
Efficiency in Government Procurement  
Through Compliance With Certain  
Immigration and Naturalization Act  
Provisions

## Presidential Documents

## Title 3—

Executive Order 12989 of February 13, 1996

## The President

**Economy and Efficiency in Government Procurement Through Compliance With Certain Immigration and Naturalization Act Provisions**

This order is designed to promote economy and efficiency in Government procurement. Stability and dependability are important elements of economy and efficiency. A contractor whose work force is less stable will be less likely to produce goods and services economically and efficiently than a contractor whose work force is more stable. It remains the policy of this Administration to enforce the immigration laws to the fullest extent, including the detection and deportation of illegal aliens. In these circumstances, contractors cannot rely on the continuing availability and service of illegal aliens, and contractors that choose to employ unauthorized aliens inevitably will have a less stable and less dependable work force than contractors that do not employ such persons. Because of this Administration's vigorous enforcement policy, contractors that employ unauthorized alien workers are necessarily less stable and dependable procurement sources than contractors that do not hire such persons. I find, therefore, that adherence to the general policy of not contracting with providers that knowingly employ unauthorized alien workers will promote economy and efficiency in Federal procurement.

NOW, THEREFORE, to ensure the economical and efficient administration and completion of Federal Government contracts, and by the authority vested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 486(a) and 3 U.S.C. 301, it is hereby ordered as follows:

**Section 1.** (a) It is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration and completion of Federal Government contracts, contracting agencies should not contract with employers that have not complied with section 274A(a)(1)(A) and 274A(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1324a(a)(1)(A), 1324a(a)(2)) (the "INA employment provisions") prohibiting the unlawful employment of aliens. All discretion under this Executive order shall be exercised consistent with this policy.

(b) It remains the policy of this Administration to fully and aggressively enforce the antidiscrimination provisions of the Immigration and Nationality Act to the fullest extent. Nothing in this order relieves employers from their obligation to avoid unfair immigration-related employment practices as required by the antidiscrimination provisions of section 1324(b) of the INA (8 U.S.C. 1324b) and all other antidiscrimination requirements of applicable law, including the requirements of 8 U.S.C. 1324b(a)(6) concerning the treatment of certain documentary practices as unfair immigration-related employment practices.

**Sec. 2.** Contractor, as used in this Executive order, shall have the same meaning as defined in subpart 9.4 of the Federal Acquisition Regulation.

**Sec. 3.** Using the procedures established pursuant to 8 U.S.C. 1324a(e), the Attorney General: (a) may investigate to determine whether a contractor or an organizational unit thereof is not in compliance with the INA employment provisions;

(b) shall receive and may investigate complaints by employees of any entity covered under section 3(a) of this order where such complaints allege noncompliance with the INA employment provisions; and

(c) shall hold such hearings as are required under 8 U.S.C. 1324a(c) to determine whether an entity covered under section 3(a) is not in compliance with the INA employment provisions.

Sec. 4. (a) Whenever the Attorney General determines that a contractor or an organizational unit thereof is not in compliance with the INA employment provisions, the Attorney General shall transmit that determination to the appropriate contracting agency and such other Federal agencies as the Attorney General may determine. Upon receipt of such determination from the Attorney General, the head of the appropriate contracting agency shall consider the contractor or an organizational unit thereof for debarment as well as for such other action as may be appropriate in accordance with the procedures and standards prescribed by the Federal Acquisition Regulation.

(b) The head of the contracting agency may debar the contractor or an organizational unit thereof based on the determination of the Attorney General that it is not in compliance with the INA employment provisions. The Attorney General's determination shall not be reviewable in the debarment proceedings.

(c) The scope of the debarment generally should be limited to those organizational units of a Federal contractor that the Attorney General finds are not in compliance with the INA employment provisions.

(d) The period of the debarment shall be for 1 year and may be extended for additional periods of 1 year if, using the procedures established pursuant to 8 U.S.C. 1324a(e), the Attorney General determines that the organizational unit of the Federal contractor continues to be in violation of the INA employment provisions.

(e) The Administrator of General Services shall list a debarred contractor or an organizational unit thereof on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs and the contractor or an organizational unit thereof shall be ineligible to participate in any procurement or nonprocurement activities.

Sec. 5. (a) The Attorney General shall be responsible for the administration and enforcement of this order, except for the debarment procedures. The Attorney General may adopt such additional rules and regulations and issue such orders as may be deemed necessary and appropriate to carry out the responsibilities of the Attorney General under this order. If the Attorney General proposes to issue rules, regulations, or orders that affect the contracting departments and agencies, the Attorney General shall consult with the Secretary of Defense, the Secretary of Labor, the Administrator of General Services, the Administrator of the National Aeronautics and Space Administration, the Administrator for Federal Procurement Policy, and such other agencies as may be appropriate.

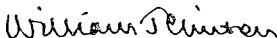
(b) The Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration shall amend the Federal Acquisition Regulation to the extent necessary and appropriate to implement the debarment responsibility and other related responsibilities assigned to heads of contracting departments and agencies under this order.

Sec. 6. Each contracting department and agency shall cooperate with and provide such information and assistance to the Attorney General as may be required in the performance of the Attorney General's functions under this order.

Sec. 7. The Attorney General, the Secretary of Defense, the Administrator of General Services, the Administrator of the National Aeronautics and Space Administration, and the heads of contracting departments and agencies may delegate any of their functions or duties under this order to any officer or employee of their respective agencies.

Sec. 8. This order shall be implemented in a manner intended to least burden the procurement process. This order neither authorizes nor requires any additional certification provision, clause, or requirement to be included in any contract or contract solicitation.

Sec. 9. This order is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees. This order is not intended, however, to preclude judicial review of final agency decisions in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*



THE WHITE HOUSE,  
February 13, 1996.

[FR Doc. 96-3646  
Filed 2-14-96; 8:45 am]  
Billing code 3195-01-P