What's Ahead For Immigrant Employee Rights Enforcement

By **Eric Dreiband, Alexander Maugeri and Wendy Butler** (December 19, 2023)

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Within the U.S. Department of Justice Civil Rights Division lies an office charged with pursuing claims that an employer has discriminated because of a worker's citizenship status under Title 8 of the U.S. Code, Section 1324b, known as the Immigrant and Employee Rights Section, or IER.

That office has recently taken center stage by notching resolutions of a size never seen in its nearly 40-year history, most recently a $25 million resolution with Apple Inc. But despite its new-found prominence, the IER could have its enforcement program shut down by the federal courts.

The IER and private individuals file Section 1324b lawsuits before a DOJ administrative tribunal called the Office of the Chief Administrative Hearing Officer. The OCAHO's administrative law judges adjudicate these suits and impose fines, back pay and injunctive relief on private businesses when the ALJs find that an employer violated Section 1324b.

On Nov. 8, the U.S. District Court for the Southern District of Texas, in Space Exploration Technologies Corp. v. Bell, determined that the OCAHO ALJ enforcement scheme violates the U.S. Constitution.[1]

And on Nov. 29, the U.S. Supreme Court heard oral argument in SEC v. Jarkesy, as to whether the U.S. Securities and Exchange Commission's ALJ enforcement scheme likewise suffers from constitutional defects.[2]

Employers now face challenges as well as opportunities. The IER will continue to pursue broad and relatively untested theories of liability under Section 1324b. At the same time, the judiciary appears skeptical of the lawfulness of these agency tribunals.[3]

The skepticism stems from various aspects of the enforcement scheme. The OCAHO ALJs lack accountability to elected officials because they are neither appointed by the president nor confirmed by the U.S. Senate. ALJ proceedings differ from those in federal court and lack the right to a jury trial.

Companies should think strategically about leveraging these types of constitutional challenges when facing Section 1324b investigations or class action-style litigation.

Section 1324b and Its Applications

Congress enacted Section 1324b in 1986 as an amendment to the Immigration and Nationality Act that newly prohibited a type of discrimination. Broadly speaking, Congress' goal was to put several types of work-authorized employees on a level playing field, whether they hailed from the U.S. or not.

To that end, the law prohibits employers from discriminating against protected workers in their hiring, firing or recruitment for a fee, because of their citizenship status. Protected workers include U.S. citizens and U.S. nationals, as well as individuals of foreign countries who have the permanent right to work in the U.S., such as lawful permanent residents — or green card holders — and those granted asylum or refugee status.

These latter categories, especially asylees and refugees, have been at the center of recent high-profile Section 1324b litigation by the DOJ. Also garnering attention are contours of an exception for certain forms of citizenship status discrimination that is not unlawful under Section 1324b if "required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract," or based on certain determinations by the U.S. attorney general.[4]

Citizenship-status discrimination generally takes two forms.

First, the DOJ may allege that an employer made a hiring or firing decision intentionally to discriminate against protected workers. The DOJ has also applied this type of alleged discrimination to temporary work visa programs, such as the H-1B visa, and the sponsoring of permanent residency through the U.S. Department of Labor's permanent labor certification program, or PERM.

The DOJ has also taken the position that limiting jobs to U.S. citizens without a legal requirement to do so can also constitute unlawful citizenship-status discrimination.

Second, Section 1324b outlaws what the DOJ calls document abuse. The same act of Congress that created Section 1324b also established employer sanctions for hiring immigrants unauthorized to work in the U.S., ushering in today's Form I-9 employment-eligibility verification system, implemented when employees are onboarded.

The statute prohibits employers from requesting, on the basis of citizenship status or national origin, "more or different documents than are required [under the I-9 program] or refusing to honor documents tendered that on their face reasonably appear to be genuine" from certain categories of protected individuals.[5]

Here, well-meaning employers — or their agents — can potentially find themselves in the DOJ's crosshairs when trying to ensure they do not hire people who are not authorized for employment.

The DOJ enforces Section 1324b by launching its own investigations, investigating charges workers file, issuing investigative subpoenas to compel the production of documents and witnesses, and filing suits, typically on behalf of large numbers of employees.

Section 1324b also authorizes workers to file their own OCAHO cases, including class actions. Prevailing plaintiffs can recover attorney fees, as well as obtain injunctions, civil penalties and back pay.

Whether initiated by the DOJ or a private plaintiff, all Section 1324b litigation starts in the OCAHO rather than in federal district court, with review in federal courts of appeal available only after a final ruling by the agency's in-house ALJ.

DOJ Enforcement Trends

The DOJ maintains a steady stream of Section 1324b investigatory matters and cases at

any given time. The government can investigate charges by aggrieved workers, launch investigations without a charge, subpoena documents and witnesses, and file individual suits and class action-style cases against employers in the OCAHO tribunal.

Historically, with an occasional exception, these matters have involved relatively small violations when compared to some of the DOJ's other civil litigation programs — at the Civil Rights Division and beyond. However, around 2020, the IER began expanding enforcement by bringing and settling very large class action-style cases.

Despite bigger targets, the DOJ's enforcement program includes several relatively untested applications. These include green card sponsorship as it relates to temporary work visas and the intersection of export control laws and citizenship-status discrimination.

These issues are untested partly because most companies settle without contested litigation. This leads to relatively few decisions by OCAHO ALJs, and even fewer by federal courts of appeal.

Temporary Work Visas

Last month, the DOJ announced what it described as a landmark settlement resolving allegations that Apple discriminated against protected workers. The application of Section 1324b to the facts was fairly novel.[6]

Apple, like many companies in the technology sector and beyond, hires sizable numbers of foreign workers whose eligibility to work in the U.S. comes from time-limited temporary work visas such as the H-1B visa. A mechanism exists for such workers to be sponsored for permanent work authorization.

That permanent labor certification program — PERM — implicates the DOL's enforcement authority and involves a regulatory process requiring the employer to certify that there are insufficient U.S. workers who are able, willing, qualified and available to accept the job.[7]

The DOJ contends that an employer violates Section 1324b's anti-discrimination protections if the employer engineers its PERM process to intentionally discriminate against protected U.S. workers. The DOJ may consider evidence of a violation to include practices such as the adoption of advertising techniques that limit the potential U.S. workers who will see the PERM job posting.

As to Apple, the DOJ alleged that the company unlawfully deterred protected workers from applying for positions that Apple preferred to fill with temporary visa holders who were already working at the company. The DOJ alleged that Apple treated applicants for PERM jobs differently than applicants for other jobs, and that the difference in treatment was part of a scheme to discriminate against U.S. workers.

For example, the DOJ cited Apple's requirement that applicants for PERM jobs mail paper applications, even though the company allowed electronic applications for other types of jobs.

The Apple settlement had similarities to a case three years ago. In December 2020, the DOJ sued Facebook — now Meta Platforms Inc. — and alleged Section 1324b violations related to Facebook's PERM process and hiring practices. In October 2021, the DOJ and the DOL announced a joint settlement with Facebook that included $14.25 million in back pay and civil penalties, and changes to the company's practices.[8]

Both the Apple and the Facebook cases settled before an ALJ reached a final decision, which also meant that no federal court had an opportunity to evaluate the DOJ's Section 1324b theory about PERM-related hiring practices.

The DOJ's legal theory about how Section 1324b applies to employer practices governing temporary visa holders and the PERM process likewise remains unconsidered by a federal court.

In addition, such claims are highly fact-intensive, even if the DOJ is right about Section 1324b. An employer that faces an investigation or suit may be able to distinguish its practices from those the DOJ has found to be problematic.

Export Controls

U.S. export controls, such as the International Traffic in Arms Regulations or the Export Administration Regulations, place certain restrictions on both tangible exports and the provision of regulated technology or information to so-called foreign persons.

"Exports" can occur even when these transfers occur completely inside the U.S. The ITAR and EAR define a foreign person — i.e., a non-U.S. person — as anyone other than a lawful permanent resident, U.S. citizen or "protected individual as defined by 8 U.S.C. § 1324b(a)(3)."

Frequently, companies need to conduct a compliance assessment to verify whether someone is a U.S. person by asking for proof of citizenship or immigration status.

Historically, the Civil Rights Division has taken a relatively hard line against employers that err on the side of export control compliance, and found such employers liable for citizenship-status discrimination. Some employers have argued that the IER should exercise enforcement discretion and decline to bring matters against companies that seek export compliance — another clear government priority.

Perhaps mindful of such criticism, the IER published a fact sheet earlier this year providing companies with what the government says will enable them to comply with both the INA and export control regulations.

In line with the DOJ's stated approach, in August it sued Space Exploration Technologies — SpaceX — in the OCAHO.[9] According to a DOJ press release, the suit alleges that SpaceX "routinely discouraged asylees and refugees from applying and refused to hire or consider them, because of their citizenship status."[10]

According to the DOJ, in job postings and public statements, SpaceX incorrectly claimed that federal export control laws only enabled SpaceX to hire U.S. citizens and green card holders when export control laws imposed no such hiring restrictions.[11]

Constitutional Headwinds

The DOJ's Section 1324b enforcement program has recently come under a cloud.

First, SpaceX implemented a defensive strategy that involved going outside the OCAHO. It sued the DOJ in the U.S. District Court for the Southern District of Texas to block the lawsuit, claiming that Section 1324b unlawfully requires a company to defend itself in

administrative court.

Specifically, SpaceX argued that even though they have final decision-making authority under Section 1324b, OCAHO ALJs are unconstitutionally appointed because they are appointed by the U.S. attorney general, rather than being appointed by the president with the advice and consent of the Senate,

The Texas district court agreed with SpaceX that the Constitution's appointments clause requires (1) that ALJs go through the same process of presidential nomination and Senate approval as cabinet officers and federal judges or (2) that ALJ decisions be reviewed by an officer appointed in that matter, such as the U.S. attorney general.

In response to the lawsuit, the DOJ tried to salvage the scheme by implementing a new rule interpreting Section 1324b. The DOJ's rule purports to allow the attorney general to review an ALJ's Section 1324b orders.

The court rejected the DOJ's position and instead decided that the DOJ's rule "conflicts with the plain language of 1324b, which only provides for review" in a federal appeals court.[12] The court concluded that Section "1324b proceedings are unconstitutional because the Attorney General is not allowed to review OCAHO ALJs' decisions."[13]

The court thus granted SpaceX a preliminary injunction preventing the government from continuing with its OCAHO lawsuit. The injunction does not, by its terms, prevent the DOJ from filing an OCAHO lawsuit against another company.

The preliminary determination in the SpaceX case could be overturned on appeal to the U.S. Court of Appeals for the Fifth Circuit, or by the U.S. Supreme Court. Congress could also act to amend Section 1324b's process for appointing and reviewing ALJs, such as by providing for attorney general review of ALJ decisions.

For now, however, companies facing Section 1324b matters may consider raising similar objections.

Second, ALJ adjudications brought by the federal government are facing broader headwinds. In recent years, the Supreme Court has decided multiple challenges to administrative agencies, including several cases involving structural constitutional challenges.

The Supreme Court cases have challenged obstacles to the president's ability to supervise subordinates at a variety of federal agencies.[14] And last term, in Axon Enterprise Inc. v. Federal Trade Commission, the Supreme Court ruled that companies facing proceedings before agency ALJs need not await a final decision before challenging the agencies' constitutional structure in federal court.[15]

Most recently, on Nov. 29, the Supreme Court heard oral argument in Jarkesy, another challenge to an agency's ALJ adjudication process.[16]

That case reviews a Fifth Circuit decision from last spring, which held that "the SEC's in-house adjudication ... violated [the] Seventh Amendment right to a jury trial" and that SEC ALJs are improperly insulated by two layers of removal protection, impeding the president's ability to supervise the executive branch.[17]

The Supreme Court's Jarkesy decision, expected by June 2024, could potentially redirect certain government enforcement litigation to federal district court rather than to ALJs.

Together, these cases — and the judiciary's heightened willingness to apply constitutional limits to agency power — potentially provide companies with additional tools to wield when facing Section 1324b enforcement.

The Road Ahead

The government's stepped-up enforcement of immigration-related employment matters, coupled with litigation that challenges whether Section 1324b and other administrative tribunals violate the Constitution, have cross-cutting significance.

On the one hand, depending on further litigation, the appointments clause claim recognized in SpaceX could leave the DOJ without any viable mechanism to enforce 1324b.

On the other hand, the DOJ is unlikely to abate its heightened Section 1324b enforcement program — and the constitutional challenges could fail on appeal or Congress could enact legislation that changes the OCAHO ALJ appointment process.

Employers may wish to take an all-things-considered approach that carefully analyzes the facts and law underlying the DOJ's Section 1324b enforcement priorities and the headwinds facing DOJ's enforcement program when evaluating their obligations, and when responding to investigations and lawsuits, under this increasingly important statute.

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[1] Space Expl. Techs. Corp. v. Bell, No. 1:23-cv-00137 (S.D. Tex. Nov. 8, 2023), ECF No. 28 ("SpaceX").

[2] Sec. & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. 2023).

[3] 8 U.S.C. § 1324b(a)(2)(C).

[4] Id. § 1324b(a)(6).

[5] Justice Department Secures $25 Million Landmark Agreement with Apple to Resolve Employment Discrimination Allegations Based on Citizenship Status, U.S. Dep't of Justice, Off. of Pub. Affairs (Nov. 9, 2023), https://www.justice.gov/opa/pr/justice-department-secures-25-million-landmark-agreement-apple-resolve-employment.

[6] See Permanent Labor Certification, U.S. Dep't of Lab., Emp. & Training Admin., https://www.dol.gov/agencies/eta/foreign-labor/programs/permanent (last accessed Dec. 6, 2023).

[7] Justice, Labor Departments Reach Settlements with Facebook Resolving Claims of Discrimination Against U.S. Workers and Potential Regulatory Recruitment Violations, U.S. Dep't of Justice, Off. of Pub. Affairs (Oct. 19, 2021), https://www.justice.gov/opa/pr/justice-labor-departments-reach-settlements-facebook-resolving-claims-discrimination-against.

[8] Id.

[9] United States v. Space Expl. Techs. Corp., 18 OCAHO 1499 (Oct. 10, 2023). This OCAHO lawsuit followed an earlier skirmish in federal district court over the scope and propriety of DOJ's subpoena to SpaceX. See United States v. Space Expl. Techs. Corp., No. MISC2143DMGMRW, 2021 WL 2690874, at *1 (C.D. Cal. Mar. 29, 2021), report and recommendation adopted, No. MISC2143DMGMRWX, 2021 WL 2685630 (C.D. Cal. June 30, 2021).

[10] See Justice Department Sues SpaceX for Discriminating Against Asylees and Refugees in Hiring, U.S. Dep't of Justice, Off. of Pub. Affairs (Aug. 24, 2023), https://www.justice.gov/opa/pr/justice-department-sues-spacex-discriminating-against-asylees-and-refugees-hiring.

[11] See id.

[12] SpaceX, No. 1:23-cv-00137 (S.D. Tex. Nov. 8, 2023), ECF No. 28, at 4.

[13] See id.

[14] See, e.g., Collins v. Yellen, 141 S. Ct. 1761 (2021) (involving the Federal Housing Finance Agency); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (involving Consumer Financial Protection Bureau); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010) (involving Public Company Accounting Oversight Board); see also Lucia v. Sec. & Exch. Comm'n, 138 S. Ct. 2044 (2018).

[15] Axon Enter., Inc. v. Fed. Trade Comm'n, 598 U.S. 175 (2023).

[16] Jarkesy, No. 22-859 (U.S. 2023).

[17] Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446, 450 (5th Cir. 2022).