PUBLICATION

Diversity in Citizenship, Immigration Status, and National Origin: How to Navigate Modern Workforce Demographics

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As of 2021, about 45 million people living in the U.S. were born in other countries. Though this number has declined since the 2018 peak of 47 million, foreign-born residents have averaged 15 – 16 percent of the U.S. population for the better part of the last two decades. Three-quarters of these foreign-born residents are in the U.S. lawfully. In 2022, foreign-born workers – many of whom are former international students who earned their degrees from a U.S. university – accounted for just over 18 percent of the U.S. labor force.

According to the National Science Board, more international students seek out higher education in the U.S. than any other country. In addition, foreign-born students are significantly more likely to pursue degrees in science, technology, engineering, and mathematics – nearly half of the international student population in the U.S. pursue bachelor's degrees in STEM fields, compared to about 35 percent of U.S. citizens and permanent residents. In 2019, half of the master's and doctoral degrees granted in STEM fields by U.S. institutions went to foreign students.

While the COVID-19 pandemic temporarily depressed immigration rates, the numbers had already started to recover in 2022. So, what does this mean for U.S. employers?

Between a Rock and a Hard Place

Employers across industries increasingly encounter foreign-born candidates when recruiting – especially since pandemic-related job losses particularly affected this demographic. And while approximately 35 percent of foreign-born workers in 2022 were employed in management, professional, and related occupations, they continue to represent an outsized portion of those employed in service roles; natural resources, construction, and maintenance occupations; and production, transportation, and material moving occupations.

At the same time, immigration-related enforcement is on the rise – but not in the way most employers think. It is true that a significant component of U.S. immigration policy involves detecting and preventing unauthorized immigrants from entering or remaining in the country. But there remain certain areas of enforcement that focus on the behavior of *employers*, rather than the foreign-born workers they may employ.

The regulatory framework with which most employers are familiar is the one enforced by U.S. Immigration and Customs Enforcement, or ICE, which is a part of the U.S. Department of Homeland Security. ICE's large-scale raids of employer worksites often make the news: a 2019 raid of five poultry processing plants in Mississippi, which resulted in the arrest of 680 unauthorized workers, is the largest in ICE history and still looms large over employers in the meat processing industry. But statistics show that these large-scale raids have largely subsided since 2020, and even the I-9 audits that ICE is known for have not yet returned to pre-pandemic numbers.

However, another enforcement scheme has proven to be a tough match for even compliance-minded employers: the Immigrant and Employee Rights (IER) Section of the U.S. Department of Justice (DOJ). The IER enforces the anti-discrimination provisions found at Section 1324b of the Immigration and Nationality Act,

which prohibits discrimination based on citizenship, immigration status, or national origin, as well as unfair documentary practices, during recruitment, hiring, and termination of workers.

The IER is the agency behind the recent DOJ suit against SpaceX, alleging the company discriminated against asylees and refugees in hiring; as well as a spate of settlements, now up to $1.6 million, with 30 employers who recruited at Georgia Tech using the university's recruiting platform – a platform that allowed posters to select discriminatory options unlawfully excluding non-U.S. citizen workers. Perhaps most worrisome to employers that do hire and sponsor foreign national workers, IER is the agency that secured a $4.75 million settlement with Facebook in 2021, alleging that the recruitment conducted by the company in connection with the permanent labor certification process (known as “PERM”) – the mandatory first step in the employment-based green card sponsorship process – violated the anti-discrimination requirements of Section 1324b of the INA.

In summary, employers are encountering foreign-born workers more frequently than ever before, in an evolving compliance landscape where significant enforcement penalties loom at every stage of the employee lifecycle – recruitment, hiring, employment, and termination.

Finding a Safe Harbor

Navigating the myriad, often opposing, legal requirements surrounding the recruitment and hiring of workers in the U.S. can leave employers feeling lost at sea, but the law does offer some safe harbor to employers.

The legal concept of safe harbor is an important one for U.S. employers recruiting and hiring in the U.S. labor market. In general, a safe harbor is a provision in a law that protects the object of enforcement from liability or a penalty if certain conditions are met. U.S. immigration law is short on safe harbor provisions, but it does have one: Employers who enroll in and use the voluntary E-Verify system to verify the employment authorization of new hires, in addition to completing the mandatory I-9 verification process, are protected from civil and criminal penalties related to the hiring of undocumented workers.

In other words, an E-Verify employer who receives an "employment authorized" result for a worker cannot be charged with knowing employment of an unauthorized worker, if that worker is later revealed to be unauthorized. Somewhat similarly, employers who properly conduct the I-9 verification process and correctly complete Form I-9 for a worker establish a "rebuttable presumption" against a charge of knowing employment of an unauthorized worker.

But the I-9 employment verification process and E-Verify program are meant to verify a worker's employment authorization *after* an offer of employment has been made. Any employer knows that the recruitment and hiring process is costly – advertisements must be placed, applicants must be screened and interviewed, and offers must be negotiated. Also costly is the sponsorship of foreign national workers for temporary or permanent status in the U.S. This gives employers a clear incentive to determine the immigration status and work authorization of a candidate before an offer is made, whether or not the company offers immigration sponsorship to workers.

Building a Safe Harbor

With limited safe harbor protections available in immigration law, it is essential for employers to create a safe harbor of their own by developing, implementing, and enforcing a recruitment and hiring process that complies with federal anti-discrimination and employment verification requirements, while allowing them the flexibility needed to decide if and when they will sponsor foreign national workers for immigration status.

Employers can have highly diverse workforces without offering temporary or permanent immigration status to candidates. U.S. workers are those who are authorized to work permanently in the country without needing

immigration sponsorship. U.S. workers are not just U.S. citizens, but an incredibly diverse pool of residents – lawful permanent residents, U.S. nationals, asylees, and refugees.

Building a compliant set of recruitment, hiring, and employment processes requires employers to have a clear immigration sponsorship policy and a consistent procedure for screening candidates for immigration sponsorship needs. The best starting place for employers is to add one simple question to their employment application: *Will you now, or in the future, require immigration sponsorship to work in the U.S.?* Employers may decline to hire candidates who will require immigration sponsorship to either join the employer or to continue to work for the employer in the future.

Employers who do not intend to offer sponsorship for a particular position can indicate as much in their advertisements: *Immigration sponsorship is not available for this role.* But employers should never use applicant-limiting language (e.g., U.S. citizens only; STEM OPT preferred) in their advertisements, as even the best-intentioned employers can run afoul of anti-discrimination regulations by doing this.

In fact, that is precisely the issue in IER's current suit against SpaceX. IER alleges that SpaceX had a policy of refusing to consider asylees and refugees, who are permanently authorized to work in the U.S. because SpaceX technology is subject to U.S. export control laws. Under those laws, giving certain foreign persons access to regulated technology is prohibited unless the employer first obtains an export license permitting the access. To avoid the lengthy and difficult export license application process, regulated employers frequently refuse to hire any worker who would require an export license, forgetting that many such workers, such as asylees and refugees, are also protected from discrimination in recruitment and hiring based on their citizenship or national origin.

The Citizenship and Immigration Status Diversity of U.S. Workers

A common misconception among employers is that preferring U.S. citizen workers is always a safe bet. The truth is that Section 1324b of the INA permits employers to prefer U.S. citizens *or nationals* over *equally qualified* "alien" workers. An alien is any person who is not a citizen or national of the U.S., making it a much narrower category than "U.S. worker," which also includes permanent residents, asylees, and refugees. Therefore, preferring to hire a U.S. citizen over a *more qualified* U.S. worker, like an asylee, due to the asylee's national origin or immigration status, could place the employer at risk of an enforcement action.

Concrete steps that an employer can take to improve their handling of foreign-born candidates include:

1. Establish and adhere to written policies and procedures with respect to recruitment, hiring, employment verification, and immigration sponsorship. Employers do have a lot of latitude when determining internal practices for immigration sponsorship, but consistency is key.

2. Audit current recruitment activities for problematic language or requirements, especially if the company uses third-party recruitment tools or platforms, to ensure no improper limitations or problematic requirements are included in your advertisements.

3. Audit employment verification practices, making sure they comply with current requirements, especially if the company dabbled in remote document inspection during the pandemic, as I-9s completed over the past three years may require special attention or updates for compliance purposes.

4. Consider whether to enroll in E-Verify, paying attention to state-level E-Verify requirements in any state where your company has even a single employee; or, if already enrolled, audit the company's

E-Verify usage to make sure it remains in good standing in the program.

5. Provide regular training for human resources and recruiting personnel, as well as any other personnel involved in candidate interviews and hiring decisions, on the employer's obligations under the employment verification and anti-discrimination provisions of the INA.

While employers do not need to engage in immigration sponsorship of foreign workers to foster a diverse workforce, a robust immigration sponsorship policy can be an essential component of a larger recruitment strategy. This is especially true as foreign-born individuals continue to make up a substantial portion of students completing their higher education in the U.S. and entering the U.S. workforce. But of course, employers must make sure not to give the impression that they prefer to hire foreign workers with temporary work authorization over U.S. workers with permanent authorization to work in the U.S.

For more information about these and other employment-related immigration compliance issues, please contact any member of Baker Donelson's >Immigration Group.