

CHAPTER VIII. IMPACT OF THE BASIC PILOT ON DISCRIMINATION

A. BACKGROUND

1. ABOUT THIS CHAPTER

This chapter examines the impact of the Basic Pilot program on discrimination.⁹⁷ As noted in Chapter VII, there is evidence that some Basic Pilot employers violate the Memorandum of Understanding (MOU) provision that they will not discriminate “unlawfully against any individual in hiring, firing, or recruitment practices because of his or her national origin, or in the case of a protected individual...because of his or her citizenship status.” However, this provision does not impose new restrictions on pilot employers. It simply reiterates laws applicable to all employers, which both pilot and non-pilot employers undoubtedly violate to some degree. This section, therefore, focuses on the question of whether pilot employers are more or less likely than non-pilot employers to discriminate. Related issues such as determining the level of employment discrimination in the United States and the impact of Form I-9 employment verification on discrimination are beyond the scope of this evaluation.

Stakeholders have not agreed about the likely impact of the Basic Pilot program on discrimination. Some have contended that the program will reduce discrimination by making employers more willing to hire immigrants when they believe they can determine with more confidence which ones are work-authorized. Others have argued that discrimination is likely to increase under the Basic Pilot program because employers are likely to ignore Basic Pilot procedures designed to protect employee rights. This chapter presents evidence supporting both of these hypotheses. However, when all the evidence from the evaluation is weighed, the net effect of the Basic Pilot program on discrimination is not clear.

The remainder of this section discusses the definition of discrimination, how theories of discrimination are applied, and the expected impacts of the Basic Pilot program on discrimination. Section B presents information on the impact of the Basic Pilot on employers’ willingness to hire immigrants. Sections C through E describe major evaluation findings related to discrimination during recruitment, hiring, and the time shortly after hiring. Section F examines related indicators that may have some bearing on discrimination, including workforce diversity and employee perceptions of discrimination. The final section summarizes the chapter findings.

⁹⁷ This focus is analogous to the General Accounting Office’s emphasis in evaluating the effect of employment sanctions on discrimination. That evaluation examined “whether widespread discrimination has resulted solely from the law [IRCA].”

2. WHAT IS DISCRIMINATION?

Discrimination is defined as adverse treatment of individuals based on group identity.⁹⁸ In employment, discrimination is defined as differential treatment in the labor market based on ascriptive characteristics, such as race or citizenship, that are unrelated to productivity or performance.⁹⁹ As such, discrimination can occur at every stage of the employment relationship, including recruitment, hiring, placement, compensation, training, evaluation, disciplinary action, treatment on the job, and dismissal.¹⁰⁰ Since the Basic Pilot procedures primarily affect newly hired employees, any employment discrimination resulting from the program is most likely to be observed during recruitment, selection, or the time shortly after hire.

Title VII of the 1964 Civil Rights Act defines two major types of employment discrimination, based on the employer's intent. Intentional discrimination, also known as disparate treatment, occurs when an employer intentionally denies an opportunity to a worker because of race, gender, national origin, or other protected status.¹⁰¹ In contrast, unintentional discrimination addresses employment practices that appear neutral on their face, but have a disproportionate effect on the employment opportunities of protected groups. Thus, an employer who uses hiring criteria that disproportionately exclude members of a protected group and who cannot demonstrate the "business necessity" of the practice has violated the law. The basic idea of unintentional discrimination is that an employment practice should affect different classes of people in the same way.¹⁰²

There are many ways that employers might discriminate against certain groups of job applicants or employees. Discriminatory and illegal acts include asking job applicants for documentation proving identity and authorization to work; asking for specific types of documents such as a driver's license, Social Security card, or green card; and asking for extra documents when presented with documentation unfamiliar to the employer.¹⁰³ Generally, statements in job advertisements or interviews that jobs are limited to U.S. citizens or permanent residents are illegal.¹⁰⁴ During job interviews, illegal questions include asking applicants if English is a second language or what their native language is.¹⁰⁵ It is also illegal to refuse to hire applicants based on the future expiration dates of work-authorization documents.¹⁰⁶ Some authors have stated that asking applicants about work-authorization or immigrant status is also illegal. However, the Office of Special

⁹⁸ Albeda et al., 1997.

⁹⁹ Blanchard and Crosby, 1989.

¹⁰⁰ Benokraitis, 1997; Gutek et al., 1996; James et al., 1994a and 1994b; Zwerling and Silver, 1992.

¹⁰¹ Gold, 1993.

¹⁰² Gold, 1993.

¹⁰³ Brett, 1998; Karabetsos, 1995.

¹⁰⁴ Brett, 1998; Karabetsos, 1995.

¹⁰⁵ Brett, 1998.

¹⁰⁶ Brett, 1998.

Counsel for Immigration-Related Unfair Employment Practices in the Department of Justice (OSC) says that it is not illegal to ask the more general question “Are you authorized to work in the United States?” Discriminating in any way on the basis of spoken accent, facial or racial characteristics, or surname is also illegal.¹⁰⁷ Additionally, any interview questions that are not work-related may constitute grounds for charges of illegal employment discrimination.

Employers can also take actions designed to proactively prevent employment discrimination. Such proactive interventions are required for affirmative action employers.¹⁰⁸ Employers can try to prevent employment discrimination by aggressively recruiting groups historically underrepresented in their industries.¹⁰⁹ Widespread advertising of job vacancies and use of employment agencies handling a multicultural set of job applicants can increase the presence of historically excluded groups compared to employers that use only walk-ins or word-of-mouth to recruit new employees.¹¹⁰

Theories of discrimination attempt to identify its underlying causes. Many objections to verification of work authorization stem from the fear that employers will exploit the procedures to discriminate against noncitizens, foreign-appearing citizens, and members of specific ethnic groups. However, discrimination can arise from, and be sustained by, multiple sources.¹¹¹ Employers, customers, and co-workers can all be the sources of discrimination.

Similarly, individuals may discriminate for a variety of reasons. For example, individuals may have a “taste for discrimination” in which the dislike for members of a group affects economic judgments. Alternatively, employers may discriminate against all members of a particular group because they believe that members of the group are more likely to have undesirable characteristics than are members of other groups. The key to this form of discrimination, known as “statistical discrimination,” is that judgments about individuals are based on group characteristics.¹¹² For example, an employer, fearing that an applicant with a Hispanic surname could be an undocumented immigrant, refuses to hire anyone with such a name.

3. APPLYING THE THEORIES OF DISCRIMINATION

Defining and measuring whether a particular practice reflects discrimination, or discriminatory intent, can be a complicated and delicate matter. For example, employers would not be intentionally discriminating if they keyed incorrect information because they find it harder to interpret Form I-9 information provided by foreign-born employees,

¹⁰⁷ Brett, 1998.

¹⁰⁸ Konrad and Linnehan, 1995.

¹⁰⁹ Holzer and Neumark, 2000; Konrad and Linnehan, 1995.

¹¹⁰ Braddock and McPartland, 1987.

¹¹¹ Becker, 1971.

¹¹² Aigner and Cain, 1977; Bielby and Baron, 1986; Konrad and Cannings, 1977.

despite making a good-faith effort to do so. But the system's requirement to key in information could be viewed as causing unintentional discrimination because many foreign-born employees are likely to have uncommon names. On the other hand, employers who are consistently less careful about how they enter Hispanic compound names would be intentionally discriminating.

It is possible that some work-authorized noncitizens may "self-select" out of applying for jobs with pilot participants, because of either the perceived burden of pilot verification or perceived prejudice on the part of the employer. This outcome needs to be distinguished from changes in recruiting and hiring resulting directly from employer actions.

Discrimination against job applicants who look or sound foreign is particularly difficult to assess because there are no objective measures in employment records to identify this type of discrimination. The structured employee interviews conducted as a part of this evaluation collected information on certain individual characteristics, such as interviewer-reported proficiency in English, acculturation, and language identity (choosing to conduct the interview in Spanish), to examine the more subjective aspects of discrimination.

An important consideration in reviewing the results presented in this chapter is that there was a tight labor market in the United States during the evaluation period. In this situation, the available supply of workers is insufficient to meet the demand, and employers are less likely to indulge any preferences they may have to hire native-born or non-minority individuals. It is reasonable to believe that more discrimination would have been observed had the evaluation been conducted during a recession.

The focus of this chapter is on discrimination in recruiting, hiring, and the initial period after hiring, when employers might discriminate against individuals receiving a "tentative nonconfirmation." Discrimination related to subsequent dismissal, promotion, and wages is not covered, on the assumption that discrimination in these areas is much less likely to be affected by the Basic Pilot program.

4. EXPECTED IMPACTS OF THE BASIC PILOT PROGRAM ON DISCRIMINATION

As discussed in Chapter II, the potential impact of automated employment verification on discrimination was a topic frequently discussed prior to the implementation of the pilots. Two plausible-sounding, but seemingly contradictory, views were put forward. These alternate views are presented briefly here.

a. THE VIEW THAT THE BASIC PILOT PROGRAM WILL DECREASE DISCRIMINATION

The framers of the legislation authorizing the Basic Pilot program believed that the pilot program would decrease discrimination against work-authorized employees who are, or appear to be, foreign-born by providing participating employers with increased confidence in their ability to objectively differentiate work-authorized individuals from those who are not work-authorized. This confidence was expected to result in greater willingness to hire foreign-appearing individuals and more aggressive recruiting within immigrant communities.

The General Accounting Office (GAO) and others reported that the employment verification procedures specified by the Immigration Reform and Control Act of 1986 led to an increase in discrimination in large part because employers were unsure of their ability to correctly identify individuals without work authorization.¹¹³ In this situation, some employers found it easier not to recruit and hire noncitizens and/or people who appeared to be foreign-born. Giving employers a better employment verification tool should, according to this hypothesis, make them more comfortable with their ability to screen employees and make them more likely to recruit and hire individuals who appear to be foreign-born. The end result should be a decrease in workplace discrimination.

INS program officials also reported that issues of discrimination were carefully considered in the design of the Basic Pilot program. First, based on the recommendations of GAO, the Commission on Immigration Reform, and others, policymakers designed the Basic Pilot system to treat employees as equally as possible regardless of citizenship or immigration status. The system is used to check the work-authorization status of every new employee, not just noncitizens. Thus, information on every new employee is supposed to go through the SSA database check. Additionally, policymakers decided that naturalized citizens should be treated the same as native-born citizens. Therefore, if someone claims on an I-9 form to be a citizen and SSA records do not provide verification of the claim, the person is asked to resolve the tentative nonconfirmation with SSA rather than with INS.

b. THE VIEW THAT THE BASIC PILOT PROGRAM WILL INCREASE DISCRIMINATION

Notwithstanding the intent of the framers of the Basic Pilot program to reduce discrimination, there were concerns that the Basic Pilot would have the opposite effect. For instance, inaccuracies in the SSA and INS databases could result in some work-authorized persons being incorrectly identified as not work-authorized. Since these persons would most likely be disproportionately foreign-born, this misidentification would result in unintentional discrimination against foreign-born employees. The failure of some employers to follow pilot system procedures could also result in increased discrimination. For example, employers could take adverse actions against employees who receive tentative nonconfirmations. Further, if employers believe that verifying noncitizens through the Basic Pilot system is more burdensome than verifying citizens, the pilot may increase disparate treatment of noncitizens.

Since Hispanics and Asians are more likely than whites and blacks to be foreign-born, discrimination against foreign-born (or foreign-appearing) individuals is likely to result in increased discrimination against Hispanics and Asians in particular, as well as against foreign-born individuals generally.

As detailed below, the evaluation provides evidence that is consistent with both the views of those hoping the program will decrease discrimination and those fearing it will increase discrimination. On the one hand, it appears that the pilot program does make

¹¹³ General Accounting Office, 1990a.

employers more comfortable in hiring foreign-born or foreign-appearing individuals. However, it also appears that the pilot program is likely to introduce discrimination into the hiring process and the treatment of new employees.

B. EMPLOYER WILLINGNESS TO HIRE IMMIGRANTS

Underlying the view that the Basic Pilot would decrease discrimination is the premise that the Basic Pilot program would increase employers' confidence in their ability to determine the work-authorization status of new employees. This premise was supported by the results of the employer mail survey. Ninety-four percent of the pilot employers agreed or strongly agreed that "Work authorizations obtained through the Basic Pilot verification system are more reliable than the earlier process."

Forty-five percent of Basic Pilot employers interviewed on-site said that the Basic Pilot program makes employers more willing to hire immigrants, compared to 5 percent who claimed that the pilot made them less willing. The remaining pilot employers said the program made employers neither more nor less willing. The views of non-pilot employers who were asked a similar question are consistent with those of the pilot employers.

The most frequently mentioned reason for a greater willingness to hire immigrants (expressed by 77 percent of employers who believed that the Basic Pilot program made employers more willing to hire immigrants) was that the Basic Pilot program makes employers more confident that they can determine which employees are work-authorized. The second most frequent response (expressed by 13 percent of this group) was fairly similar – the Basic Pilot program assures employers that they have a legal workforce.

Among employers who said the pilot would make it less likely for employers to hire immigrants (n=24), the explanation most frequently mentioned (by approximately 40 percent of employers) was their reluctance to bear the cost of training individuals who later turn out to be non-work-authorized. A similar percentage mentioned work disruptions that occur when individuals who turn out to be non-work-authorized leave.

In sum, the limited information from the employer surveys on the willingness of employers to hire immigrants is consistent with the view that the Basic Pilot employers will be more willing to hire immigrants. However, this greater willingness to hire immigrants will only decrease discrimination if the willingness actually affects employer actions – a subject that is discussed in the following sections.

C. RECRUITMENT OF PROTECTED GROUPS

To determine the likely effect of the pilot program on recruitment discrimination, the evaluation team asked employers a number of questions about their recruitment efforts. In the mail survey, pilot and non-pilot employers were asked whether they target recent immigrants and specified racial/ethnic minorities. Not many pilot or non-pilot employers (less than 14 percent) claimed that they targeted either of these groups (Exhibit VIII-1).

Further, the observed differences between pilot and non-pilot employers were not statistically significant.

Exhibit VIII-1: Percentage of Employers Who Targeted Specific Groups in Their Recruitment Efforts

Group	Pilot Employers	Non-pilot Employers
Recent immigrants	11	7
Racial/ethnic minorities	13	12

NOTE: Differences are not statistically significant at the 0.05 level.

SOURCE: Employer Mail Survey

To adjust for known differences between pilot and non-pilot employers, the following variables were identified as control variables: the number of employees in the establishment, the industry, and the State; the percentage of the workforce in unskilled positions; whether work is done in a clean, pleasant setting; and the location of the company’s headquarters. The result of this control process is a set of “adjusted” responses that estimate what the findings would have been if the two groups could have been matched more closely on these variables.¹¹⁴ In this case, the adjustments did not modify the original conclusions in terms of either the direction of the differences or their statistical significance.

In the on-site interview, employers were asked if they had made any changes in their recruiting practices over the last year and, if so, what changes were made. The responses to this open-ended question did not provide evidence that the pilot program had a large effect on recruiting. The major changes mentioned were “better screening and registration process” (mentioned by 12 employers) and “inform applicant that we use the program” (mentioned by 6 employers).

The analysis in this section does not lend further support to the view that the Basic Pilot program is likely to reduce discrimination. Although pilot employers said that the pilot made them more comfortable in hiring immigrants, this attitude was apparently not translated into major changes in recruitment efforts. It is possible, however, that there was an effect that the statistical tests used in this analysis were unable to detect.

D. HIRING PROCESS

In Chapter VII, the evaluation team examined employer compliance with the Basic Pilot procedures and identified a number of employer violations of procedures designed to protect employee rights and prevent discrimination against protected groups. These violations include (1) using the Basic Pilot system to prescreen job applicants, (2) selectively screening employees who appear to be foreign, (3) screening employees

¹¹⁴ See Appendix E for more information on the regression techniques used.

other than those newly hired, and (4) requesting more documents from employees than required. All of these practices are potentially discriminatory. However, their mere existence does not prove that the Basic Pilot program increases discrimination, since non-pilot employers may engage in similar practices. The evaluation team has, therefore, compared pilot and non-pilot employers on the frequency of these practices to the extent possible.

1. PRE-EMPLOYMENT SCREENING

The Basic Pilot program prohibits the prescreening of job applicants (i.e., checking work authorization through the Basic Pilot system before a job offer) on the assumption that employers who prescreen are likely to deny employment to applicants with tentative nonconfirmation findings without giving them an opportunity to contest such findings. Since foreign-born employees are more likely than native-born employees to receive tentative nonconfirmations,¹¹⁵ pre-employment screening can be expected to result in discrimination, even in the absence of an intention to discriminate on the employer's part.

The evaluation results suggest that some Basic Pilot employers are prescreening applicants. Since employers are not supposed to verify job applicants until after they are hired, no employee with a transaction database record should report having not received a job from the pilot employer to which they applied.¹¹⁶ Among interviewed employees who received a tentative nonconfirmation from the Basic Pilot system, 23 percent said that they were not offered a job, compared to 13 percent of those who were confirmed immediately. This finding suggests that some Basic Pilot employers are prescreening job applicants and then disproportionately denying employment to those receiving tentative nonconfirmations. OSC staff also told the evaluators about a Basic Pilot employer case, not settled at the time the evaluation concluded, in which pre-employment screening was alleged.

Although discrimination results when employers fail to comply with the MOU provision prohibiting pre-employment screening, the level of discrimination does not necessarily increase as a result of the pilot. Non-pilot employers may also be prescreening, using alternative procedures that are as likely as the Basic Pilot to promote unintentional discrimination.

¹¹⁵ The employee interviews indicate that nearly one-third of foreign-born employees received a tentative nonconfirmation, compared to only 9 percent of employees born in the United States.

¹¹⁶ It is possible that some employees did not know they were hired. This situation can arise with temporary employment agencies. These agencies may hire someone in the sense that they are willing to refer the employee to a suitable job. If no suitable job becomes available, the employee may not know of the agency's decision. Although these do not technically constitute prescreening cases, it is likely that most such employees with tentative nonconfirmations were denied an opportunity to appeal their nonconfirmation.

a. ASKING PROHIBITED QUESTIONS

As Exhibit VIII-2 shows, pilot and non-pilot employers both engage in practices that are suggestive of prescreening, including asking job applicants questions about their citizenship status and asking them to provide proof of work authorization prior to hiring.¹¹⁷ Most of the unadjusted differences between pilot and non-pilot employers are not statistically significant. Further, controlling for differences in employer’s industry (temporary employment agencies/help-supply services, food and lodging service industries, and other types of businesses) indicates that the apparent differences between pilot and non-pilot employers may be explained by industry. Within industries, the employees of pilot and non-pilot employers had very similar experiences regarding discriminatory questions.

Exhibit VIII-2: Percentage of Employees Answering Yes to Questions About Potentially Discriminatory Behavior, for Pilot and Non-pilot Employers

Question	Pilot Employers	Non-pilot Employers	
Before you were hired or offered a job at (Employer), were you asked if you were a U.S. citizen?	56	49	
Before you were hired or offered a job at (Employer), were you asked what country you came from?	20	24	
Before you were hired or offered a job at (Employer), were you asked what work documents or papers you had?	44	43	
Before you were hired or offered a job at (Employer), were you asked to show work documents or papers?	54	52	
Did you complete Form I-9 before you were offered a job at (Employer)?	53	31	*
Did you show any of these documents you just named before you were hired or offered a job?	58	43	*

* Differences are statistically significant at the 0.05 level before adjustment for the employer’s industry and are not statistically significant after adjustment.

SOURCE: Interviews with 256 pilot employees subsequently hired by a non-pilot establishment

During the on-site employer interview, employers were asked what information they requested from employees before hiring. Responses were provided by 88 non-pilot employers and 300 pilot employers. Approximately 23 percent of respondents admitted that they requested I-9 forms from hourly employees before hire (Exhibit VIII-3). A similar percentage admitted this practice in the 1988 GAO employer survey.

Neither the unadjusted rates nor the adjusted rates indicate a statistically significant difference between pilot and non-pilot employers in terms of requesting this “pre-employment screening” information.

¹¹⁷ Note that it is permissible to ask whether the person is authorized to work in the United States.

Exhibit VIII-3: Percentage of Employers Reporting That They Request Form I-9 or Work-Authorization Documents Prior to Hire

Form	Pilot Employers	Non-pilot Employers
Requested from hourly workers		
Form I-9	23	25
Work-authorization documents	24	32
Requested from salaried workers		
Form I-9	18	25
Work-authorization documents	16	25

NOTE: Differences are not statistically significant at the 0.05 level.

SOURCE: On-Site Employer Survey

Another source of information about employer hiring practices is the job application form. The evaluation team requested copies of these forms during the on-site visits. Fifty-three non-pilot and 256 pilot establishments provided forms for use with hourly employees and 24 non-pilot and 137 pilot establishments provided forms for use with salaried employees.¹¹⁸ The forms were examined to determine whether they included prohibited questions (Exhibit VIII-4). None of the examined forms contained questions on race, ethnicity, or primary language used. However, some of the forms did ask whether the person was a U.S. citizen, was a permanent resident of the United States, or had a green card. There were no statistically significant differences between pilot and non-pilot employers in the frequency of these questions.

Exhibit VIII-4: Percentage of Employers Using Prohibited Pre-employment Screening Questions on Job Application Forms

Job Application Question	Pilot Employers	Non-pilot Employers
Hourly workers		
Are you a U.S. citizen?	10	7
Are you a permanent resident of the United States?	1	2
Do you have a green card?	2	2
Salaried workers		
Are you a U.S. citizen?	10	8
Are you a permanent resident of the United States?	3	4
Do you have a green card?	1	0

NOTE: Differences are not statistically significant at the 0.05 level.

SOURCE: Application forms collected from employers during the On-Site Employer Survey

¹¹⁸ Some establishments had only a single form, which was counted under the hourly category.

b. CONCLUSIONS ABOUT PRE-EMPLOYMENT SCREENING

The evaluation provides convincing evidence that many Basic Pilot employers are screening job applicants. However, there is also evidence that non-pilot employers are screening applicants. The evidence on whether the Basic Pilot program results in greater discrimination due to pre-employment screening is inconclusive. One thing is clear however: The amount of discrimination engendered by pre-employment screening in the Basic Pilot program would be reduced if the system were able to return more reliable information to employers at the time of the initial query, making it less likely that work-authorized individuals would receive tentative nonconfirmations.

2. SELECTIVE SCREENING OF NEW HIRES

The evaluation team did not find indications of selective screening (i.e., selecting which newly hired employees to screen on the basis of employee characteristics, such as foreign appearance). As discussed in Chapter VII, a comparison of Form I-9 data with information on the transaction database indicates little difference in citizenship attestation between employees whose I-9 forms were verified through the Basic Pilot system (62 percent were U.S. citizens) and those whose forms were not verified through the pilot system (64 percent were U.S. citizens). Unfortunately, the evaluation team was unable to find a comparable measure of selective screening for non-pilot employers.¹¹⁹ It is, therefore, not possible to directly compare the extent to which pilot and non-pilot employers differ in the amount of selective screening they do.

Of the 10 complaints involving Basic Pilot program companies that OSC provided to the evaluation team, none included a charge of selective screening. However, this lack of evidence does not prove that selective screening is not occurring, since such cases are less obvious to employees than are many other types of procedural violations.

3. CONCLUSIONS ABOUT HIRING PRACTICES

This section examined several types of evidence related to the impact of the pilot program on discrimination in hiring. The evaluation found no evidence that employers were screening only new employees who were or appeared to be foreign-born. There is, however, considerable evidence that Basic Pilot employers are using the system to prescreen applicants. Employee rights are violated when employers fail to hire individuals with tentative nonconfirmations, because the employees are not given the opportunity to resolve the nonconfirmation. Since there are serious problems with the timeliness and accuracy of the INS database, it is reasonable to believe that unintentional discrimination against noncitizens results when employers prescreen.

The evaluation team was not able to determine whether pre-employment screening is more prevalent among pilot employers than among non-pilot employers. Further, it is

¹¹⁹ More specifically, the evaluation team was unable to formulate a question about selective screening that would be unlikely to antagonize respondents.

unknown how much more harm is done by pre-employment screening under the pilot program than through alternate pre-employment screening techniques used by non-pilot employers. Therefore, it is not possible to conclude that the Basic Pilot program has increased the level of hiring discrimination.

Even if the Basic Pilot program does not affect hiring discrimination, it is reasonable to believe that the level of hiring discrimination caused by pre-employment screening under the Basic Pilot system would be reduced if the Federal databases were more accurate.

E. POST-HIRING PRACTICES

The possibility that the Basic Pilot program could contribute to post-hiring discrimination has been of widespread concern. The likelihood that discrimination may be occurring is supported by the fact that 6 of the 10 complaints that OSC provided to the evaluation team included a charge that an employee was harmed or could have been harmed because of a Basic Pilot employer's post-hiring practices.

1. CHANGES IN THE INITIAL WORK VERIFICATION PROCESS FOR NEW EMPLOYEES

In the Form I-9 process, newly hired employees can experience discrimination if employers request more or different documents than employees are legally required to provide. The Form I-9 procedures require one document from List A (proof of identity and work authorization), or one document from List B (identity) and one from List C (employment verification).¹²⁰

During the interviews, employees were asked what documents they provided to the Basic Pilot employer during the Form I-9 process. Twenty-six percent of Basic Pilot employees reported presenting more than two documents. Only 10 percent of U.S.-born employees provided more than two documents, while 54 percent of foreign-born employees reported that they provided more than two documents. The vast majority of employees who provided more than two documents said they provided a Social Security card, a photo ID, and another document. The document presented most frequently in combination with a Social Security card and a photo ID was a lawful permanent resident card (66 percent). The degree to which these reports can be attributed to discrimination against foreign-born individuals is not clear. Employees may sometimes have offered more documents than were requested. Further, in some situations the employer can legitimately ask for additional documents. For example, the employer can request an additional picture ID if the first picture is not sufficient to establish that the ID belongs to the individual presenting it. Further, outside of the verification process, an employer can always request a Social Security card for payroll-reporting purposes.

Even if pilot employers are found to discriminate against foreign-born individuals by requiring extra documents, the evaluation team cannot conclude, without additional information, that pilot employers do so more frequently than non-pilot employers. The

¹²⁰ Form I-9 appears in Appendix A.

best comparative information is provided by employees who reported working with a non-pilot employer as well as a pilot employer (n=256). These employees reported little difference between pilot and non-pilot employers with respect to the number or types of documents presented.

Two of the 10 complaints that the OSC provided to the evaluation team included a charge that Basic Pilot employers required more documentation than was legally required. In one of these cases, a company required an employee to provide a Social Security card even though she had already provided a U.S. passport (which is sufficient for proving both identity and work-authorization status). In the second case, the employer refused to hire a worker because the work-authorization document did not contain a fingerprint.

Pilot and non-pilot employers were both asked if they had changed how they process newly hired employees (other than the procedures required for the Basic Pilot). There was not a statistically significant difference between the two types of employers. This finding is consistent with the view that the Basic Pilot program does not affect discrimination immediately after hiring.

2. TREATMENT OF EMPLOYEES WHO RECEIVE TENTATIVE NONCONFIRMATIONS

One concern about post-hiring practices is that employers may take adverse actions against individuals who receive tentative nonconfirmations. Since individuals receiving tentative nonconfirmations are disproportionately foreign-born (as discussed in Chapter V), the impact of these actions will be discriminatory even if the employer does not intend to discriminate.

As discussed in Chapter VII, approximately 29 percent of pilot employers reported that they limit work assignments while an employee is contesting a tentative nonconfirmation. Similarly, a substantial percentage of interviewed employees who contested a tentative nonconfirmation said that their employers had not allowed them to continue working while they resolved the problem or had taken other adverse actions against them.

Non-pilot employees do not go through a verification process like the one used to resolve tentative nonconfirmations in the pilot program. Therefore, it is reasonable to conclude that failure to follow Basic Pilot procedures during the tentative nonconfirmation period has increased discrimination against foreign-born individuals compared to native-born individuals in the time immediately following hire.

3. SCREENING OF CURRENT EMPLOYEES

The evaluation team compared the hire date on the I-9 forms sampled from pilot employer records with the date the employer signed the MOU agreeing to participate in the Basic Pilot. This analysis suggested that employers rarely use the Basic Pilot system to verify employees hired before pilot program enrollment. Further, many of the cases on the transaction database in which this verification appeared to have occurred were for persons who had been rehired or whose original work-authorization papers had expired. Technically, these employees should not have been verified using the Basic Pilot program. The person doing the verification may

have been unaware that the employee was being rehired or may not have fully understood some of the restrictions on use of the Basic Pilot system. The more serious concern expressed by some stakeholders – that employers might use the system to find an excuse for firing particular employees – is not supported by this analysis. Further, none of the 10 complaints that OSC provided to the evaluation team included a charge that a Basic Pilot employer screened employees hired before the implementation of the pilot program.

4. CONCLUSIONS ABOUT POST-HIRING PRACTICES

The evaluation found convincing evidence that a substantial number of Basic Pilot employers took adverse actions against employees who received a tentative nonconfirmation, even though the pilot procedures specifically prohibit such activity. Given that these employees are disproportionately foreign-born and that non-pilot employers do not have employees in a tentative nonconfirmation category, this finding is a strong indication that the Basic Pilot program increases unintentional discrimination immediately after hiring.

F. OTHER INDICATORS OF DISCRIMINATION

1. INTRODUCTION

Up until this point, this chapter has analyzed evidence related to discrimination during recruiting, hiring, and post-hiring. In this section, two additional indicators related to discrimination are discussed: workforce diversity and employee perceptions of discrimination.

2. WORKFORCE DIVERSITY

In the mail survey, employers were asked to estimate the percentage of immigrants among hourly employees and the percentage of Hispanics/Latinos, blacks/African Americans, non-Hispanic whites, and Asians employed at their establishments. These questions allowed the evaluation team to compare employment statistics for pilot and non-pilot employers (Exhibit VIII-5).

On average, the representation of Hispanics was much greater among pilot employers than among non-pilot employers (46 percent compared to 33 percent). The representation of immigrants and blacks was also higher among pilot employers than among non-pilot employers, while the representation of whites was significantly lower among pilot employers than among non-pilot employers. The representation of Asians was essentially the same in the two groups. After adjusting for establishment size, industry classification, State, percentage of unskilled hourly employees, whether the company has establishments outside the United States, and whether work is done in a pleasant setting, the difference in the percentage of black employees reported by pilot and non-pilot employers was reduced and became insignificant. The significance of the other relationships was not affected by these controls.

Exhibit VIII-5: Mean Percentage of Employers' Workforce Reported to Be in Protected Groups

Protected Group	Mean Percent		
	Pilot Employers	Non-pilot Employers	
Immigrants*	43	36	**
Hispanics or Latinos	46	33	**
Blacks	14	8	***
Asians	6	4	

* Employees could be included in the immigrant category as well as one of the racial/ethnic groups.

** Differences are statistically significant at the 0.05 level. Adjusting for known differences between pilot and non-pilot employers did not alter this finding.

*** Significant at the 0.05 level before controlling for known differences between pilot and non-pilot employers, but not significant after controlling for these differences.

SOURCE: Employer Mail Survey

The evaluation team cannot be sure that the observed relationships are the result of the Basic Pilot program, because there may be additional variables that the evaluation team has not controlled for that would explain the relationships. In particular (as discussed in Chapters IV and VI), employers with many immigrant workers are relatively more likely to find the Basic Pilot program attractive. It is quite possible, therefore, that these findings are due to the historical ethnic composition of the establishments recruited for the pilot group.¹²¹ The possibility that uncontrolled factors explain the observed associations would explain why pilot employers were no more likely than non-pilot employers to report changes in recruitment or hiring practices regarding immigrants.

The on-site employer survey provides another general indicator of discrimination related to diversity: whether the percentage of immigrants was lower, higher, or the same as a year earlier.¹²² Eight percent of pilot employers said that the percentage of immigrants had increased, compared to 14 percent of non-pilot establishments. Approximately 11 percent of both groups responded that the percentage of immigrants had been higher a year earlier. Neither relationship was statistically significant.

3. EMPLOYEE PERCEPTIONS OF DISCRIMINATION

Employees were asked whether they felt that anyone had discriminated against them at the employer's establishment. Employees interviewed about both non-pilot and pilot

¹²¹ The evaluation team had hoped to compare pilot and non-pilot trends in the employment of protected groups by using information from establishments' Equal Employment Opportunity Commission reports. However, not enough establishments provided these reports to permit meaningful comparisons.

¹²² The comparable question in the non-pilot questionnaire asked employers to compare the current percentage of employees who are immigrants with the percentage a year earlier, or when the respondent started working at the establishment.

employers more frequently felt discriminated against by someone at the pilot employer. However, the difference was not statistically significant (Exhibit VIII-6).

Exhibit VIII-6: Reported Feelings of Discrimination Among Employees of Pilot and Non-pilot Establishments

Question	Percent Responding Yes	
	Pilot Employers	Non-pilot Employers
Do you feel you have been treated differently or discriminated against by anyone at (Employer)?	11	6
Do you feel that this situation affected your hiring, firing, or promotion with (Employer)?*	17	5
Why do you think you were treated this way? Was it because of your race or ethnicity?*	31	38

* Percentage is based on employees who reported feeling discrimination.

NOTE: Differences are not statistically significant at the 0.05 level.

SOURCE: Employee Interviews

G. NET IMPACT OF THE BASIC PILOT ON DISCRIMINATION

This chapter provides limited support for the view that the Basic Pilot program decreases discrimination by making employers more confident that new employees are work-authorized and thus making them more likely to recruit and hire immigrants. However, the evaluation team also found support for the view that the Basic Pilot program has increased discrimination in hiring and post-hiring practices. These increases occur because Basic Pilot employers do not always follow the Basic Pilot procedures. Most importantly, the evaluation provides considerable evidence that some pilot employers take adverse actions against employees who receive tentative nonconfirmations.

Given the contradictory effects of the Basic Pilot program on discrimination, the evaluation team cannot determine whether the net effect of the current Basic Pilot program is an increase or a decrease in discrimination. The dilemma is perhaps best illustrated by hypothetical examples.

First, consider an employer who has previously discriminated against immigrants out of fear that INS may penalize the establishment if foreign-appearing employees with ostensibly valid documents are found to be unauthorized. This employer believes that the Basic Pilot system makes it unlikely that he will inadvertently hire someone without work authorization. Because of this increased confidence, he hires a foreign-looking person whom he would not previously have hired. This person happens to be a work-authorized individual whose INS record has not been updated to reflect a recent extension of work authorization. When this employee is not immediately authorized by the system, the employer restricts her training until the employee contacts INS and her record is updated.

Suppose that the employee in the preceding example had been fired rather than having her training postponed. Further, suppose that she had turned down another job in order to take this one. In this scenario, the employee is probably disadvantaged because of the Basic Pilot program.

Of course, no simple metric exists to determine how much discrimination was actually experienced by the employee under the different assumptions examined. The evaluation team is therefore unable to determine the net impact of these contradictory effects.

Although it is not evident whether the net result of the Basic Pilot program is an increase or a decrease in discrimination, it is clear that discrimination under the pilot program would be reduced if the Federal databases, especially the INS databases, were more up-to-date. It would also be less if employers adhered more closely to the required procedures. In the above example, if the employee's INS records had been up-to-date, she would have reaped the benefits of the program without the subsequent discrimination, and the net result of the Basic Pilot program would clearly have been a decrease in discrimination. Similarly, the number of prescreened, work-authorized employees not offered jobs after receiving a tentative nonconfirmation would be lower if the Federal databases were more up-to-date and accurate or if employers did not prescreen job applicants.

