

SUPPORTING STATEMENT

OMB No. 1125-0016

Unfair Immigration-Related Employment Practices Complaint Form

Form EOIR-58

Part A. Justification

1. Necessity of Information Collection – Section 274B of the Immigration and Nationality Act (INA) (8 U.S.C. § 1324b) prohibits employment discrimination on the basis of citizenship status or national origin; retaliation or intimidation by an employer against an individual seeking to exercise his or her rights under this section; and "document abuse" or over-documentation by the employer, which occurs when the employer asks an applicant or employee for more or different documents than are required for employment eligibility verification under INA § 274A, with the intent of discriminating against the employee based on the employee's national origin or citizenship status. Individuals who believe that they have suffered discrimination in violation of section 274B may file a charge with the Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). The OSC then has 120 days to determine whether to file a complaint with the Executive Office for Immigration Review (EOIR), Office of the Chief Administrative Hearing Officer (OCAHO) on behalf of the individual charging party. If the OSC does not file a complaint within 120 days, it will issue a letter to the charging party informing the individual that he or she may file his or her own complaint directly with OCAHO. The individual must file his or her complaint with OCAHO within 90 days of receipt

of OSC's letter. This information collection may be used by an individual to file his or her own complaint with OCAHO. The Form EOIR-58 will elicit, in a uniform manner, all of the required information for OCAHO to accept and assign a section 274B complaint to an Administrative Law Judge for adjudication.

EOIR seeks a three-year extension and approval of several substantive changes to this information collection instrument. Two of the substantive changes are describe here, whereas the additional changes are described in response to the public comments received, including a reformulation of the burden estimate. The first substantive change is the addition of a question that solicits the complainant's national origin (actual and perceived) at the time of the alleged discrimination. The complainant's national origin is a crucial element of any complaint that involves allegations of discrimination based on national origin that was not previously captured by other questions on the form. Such information is required for the complainant to plead a prima facie case (and therefore state a claim for which relief may be granted) of national origin discrimination. 8 U.S.C. § 1324b(a)(1)(A), (a)(2)(B).

The second substantive change is the addition of a new question, with instructions, for the complainant to identify a specific individual at the business/employer to whom the complaint should be directed, and asks to provide the contact information for the business/employer's registered agent for service of process, where applicable. This additional information is necessary for OCAHO to properly effectuate service of the complaint on the respondent in the case. OCAHO has encountered numerous issues with complainants providing incorrect contact information for respondents, leading to

issues with effectuating service that significantly delay the adjudication of those cases. The goal is to avoid having the Administrative Law Judge (ALJ) issue an order to the complainant to provide that information in a separate filing, which creates an additional burden on the both the complainant and OCAHO, and often delays adjudication of the case. Therefore, collecting this information in the complaint will reduce the overall burden on both the complainant and OCAHO, and assists in the expeditious adjudication of cases under 8 U.S.C. § 1324b.

Several non-substantive were also made (e.g., technical and stylistic) with the aim of improving usability.

2. Needs and Uses - The form is filed and considered in the context of an immigration-related unfair employment practices proceeding against an employer pursuant to INA § 274B. Accordingly, the ALJ considers the information contained in the form to the extent necessary to process the complaint and determine appropriate future action in the case. Use of the Form EOIR-58 ensures complete collection of necessary information, allowing EOIR to more effectively evaluate the merits of section 274B complaints and to timely process them. Moreover, the form provides a helpful, clear, and concise summary of the steps for preparing and filing a section 274B complaint.
3. Use of Technology - The use of this form provides the most efficient means for collecting and processing the required data. The Form EOIR-58 will be available on EOIR's website for completion and printing. Following the successful pilot of

program and electronic filing system in cases filed with OCAHO, *see* <http://go.usa.gov/8wEP>, EOIR sought and has received approval to implement the permanent electronic filing system. *See* OMB#1125-0019, approved without change, (June 1, 2021). EOIR is working closely with its Office of Information Technology to launch the electronic filing system now that all approvals have been received, and once deployed, complaints will have the ability to electronically file their complaints. Currently, an applicant may type the requested information into the online form and then print it for submission to EOIR, or an applicant may print the blank form in its entirety and complete it by typing or printing legibly.

4. Efforts to Identify Duplication - The only form for filing a section 274B complaint alleging unfair immigration-related employment practices by an employer is the Form EOIR-58. A review of EOIR's existing forms revealed no duplication of effort, and there is no similar information currently being collected which can be used for this purpose.
5. Impact on Small Businesses - This collection does not have an impact on small businesses or other small entities.
6. Consequences of Less Frequent Collection - Failure to collect this information would inhibit an individual's ability to file a complaint regarding an employer's alleged unfair immigration-related employment practices. It would also substantially hinder EOIR's ability to effectively adjudicate cases under this federally mandated program.

7. Special Circumstances Influencing Collection - None of the eight special circumstances identified in OMB instruction number 7 apply to this collection.

8. Federal Register Publication and Consultation - A 60-day notice covering this collection was published in the Federal Register. *See* 86 FR 53679 (Sept. 28, 2021). A 30-day notice covering this collection was published in the Federal Register on December 1, 2021. *See* 86 FR 68287.

The Department received one comment regarding the renewal of the Form EOIR-58. The comment made several specific suggestions for improvement of the form, each of which is addressed below. The comment was received on November 29, 2021, after the close of the 60-day comment period and following the transmission and acceptance of the 30-day notice to the Federal Register. Nevertheless, the Department accepted the comment and will address the suggestions raised therein.

Comment: The comment asserts that the 30-minute estimate for completion of the form is impossibly low, and presents examples of questions or sections of the form that may be more time consuming than the previous estimate.

Response: The 30-minute estimate was derived primarily from OCAHO staff member experiences compiling mock complaints using the Form EOIR-58. However, the comment persuasively argues that, in certain circumstances, compiling and conveying the information requested by the form may take more time than originally

estimated. Accordingly, the Department is revising the average estimated time burden associated with the collection upward to one hour (60 minutes) per complainant/representative.

Comment: The comment argues generally that the Form EOIR-58 should be abolished. Specifically, the comment asserts that, for parties represented by counsel, the form is duplicative of what the attorneys have already presented in their Immigrant and Employee Rights Section (IER) charge form and in a potential OCAHO complaint. The comment also asserts that, for nonlawyers (unrepresented or “pro se” parties), the form “is a maze of traps and pitfalls, requiring legal conclusions ... and detailed descriptions of all relevant evidence.” The comment also asserts that, to their knowledge, the form is not available in any language other than English, and suggests an alternative process for filing a complaint with OCAHO.

Response: First, as discussed more fully below, the Form EOIR-58 is not duplicative of the IER charge form, as it requests more and different information than the IER charge form (information which is necessary to properly process and adjudicate OCAHO cases). Furthermore, the commenter seems to slightly misunderstand the role and purpose of the Form EOIR-58. When completed, the Form EOIR-58 is itself an OCAHO complaint, it is not in addition to “a potential OCAHO complaint” as mentioned by the commenter.

Additionally, use of the form is optional. All parties (whether represented by counsel or not) can file an unfair immigration-related employment practices complaint in

another format – such as a traditional legal complaint – provided that the alternative complaint format meets the requirements for OCAHO complaints as set forth in 28 C.F.R. Section 68.7. The Form EOIR-58 is simply an optional form provided by OCAHO in this questionnaire format in order to help walk potential complainants and their representatives through providing the information necessary to satisfy the requirements of § 68.7.

However, upon review, the optional nature of the Form EOIR-58 is not explicitly clear from the face of the form. Accordingly, the Department is proposing additional language in the instructions to the form specifying that use of the form is optional and that complainants may choose to submit a complaint in another format, provided that the complaint meets the requirements of 28 C.F.R. § 68.7.

Second, to the extent that the Form EOIR-58 does require certain legal conclusions or assertions by the complainant, it only does so as necessary to ensure that the requirements of 28 C.F.R. § 68.7 are met by use of the form. Specifically, 28 C.F.R. § 68.7(b) requires that all complaints contain “[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred.” The form tracks the language of the relevant statute (8 U.S.C. § 1324b) throughout the form in order to ensure that a party who properly completes the form will have complied with § 68.7(b) of OCAHO’s regulations. The comment also asserts that the Form EOIR-58 “veers dangerously into the substance of the matter.” However, given the requirements of § 68.7(b) and the nature of legal adjudications, the complaint form must get to the substance of the matter in order to satisfy the requirements of

OCAHO's regulations, as well as to put the opposing party on notice of the allegations against them.

Third, although the commenter is correct that the form itself is not yet available in any language other than English, OCAHO does provide detailed Spanish-language instructions for completing the form on its website. Additionally, the agency is evaluating whether it is feasible for the form or its instructions to be translated into additional languages. However, in light of the fact that all documents submitted to OCAHO (including complaints) must be in English or accompanied by a certified translation, *see* 28 C.F.R. § 68.7(e), there is some concern that providing the form itself in other languages (rather than providing translated instructions) would invite parties to submit their complaint in a language other than English in contravention of OCAHO's regulations. Nevertheless, OCAHO appreciates this comment and is actively working on ways to ensure that the complaint form is accessible to individuals with limited English proficiency.

Finally, regarding the alternative complaint process suggested by the commenter, OCAHO offers the following responses: Whether represented by counsel or not, complainants already have the option to file an original OCAHO complaint in an alternative format (i.e., not using the Form EOIR-58). As discussed above, we have proposed adding language to the instructions clarifying that this option is available to potential complainants and their representatives. Furthermore, as discussed further below, the information asked for and provided on the IER charge form is often insufficient to satisfy the requirements for the contents of a complaint and to allow

OCAHO to properly process and adjudicate these cases. Accordingly, a “much-simplified version of Form EOIR-58 that merely asks for information that has changed since the time the IER charge form was filed” (as the commenter suggests) would not be feasible. Lastly, the commenter suggests that OCAHO provide the option for certain parties to proceed via interview with OCAHO staff in lieu of the complaint form. Given OCAHO’s current staffing levels as well as its role as a neutral adjudicatory body, implementation of this recommendation is also not feasible.

Comment: The comment also argued that a process should be created to allow for electronic submission of Form EOIR-58, providing examples of other agencies that accept complaints electronically as well as extolling the benefits (to both OCAHO and potential complainants) of electronic filing.

Response: OCAHO agrees that there are numerous benefits to electronic filing, and has been working to implement such a process. OCAHO’s public portal, whereby complainants could file Form EOIR-58 (and other documents) electronically, is under active development and is nearing completion and deployment. Furthermore, in light of the exigencies presented by the COVID-19 pandemic, OCAHO has been accepting new complaints via email since April of 2020. More information about filing complaints by email is available at the following location:

<https://www.justice.gov/eoir-operational-status/filing-email-office-chief-administrative-hearing-officer>

Comment: The commenter suggests that the requirement to provide five copies of Form EOIR-58 with original signatures should be abolished.

Response: The requirement to file five copies of Form EOIR-58 is not a requirement imposed by the form itself, but rather is a requirement imposed by OCAHO's regulations. *See* 28 C.F.R. § 68.6(a). Therefore, we are not able to abolish that requirement in the context of revisions to the Form EOIR-58. However, OCAHO appreciates this comment and is considering adjustments to the filing requirements in its regulations, particularly as we move toward electronic filing.

Comment: The comment argues that all sections of the Form EOIR-58 that duplicate the IER charge form should be removed, specifically highlighting the employer information section and the citizenship and immigration status sections of the form.

Response: Although on their face, some sections of the Form EOIR-58 appear to duplicate sections of the IER charge form, in actuality the Form EOIR-58 requests more or different information than the IER charge form in many respects. All of the additional or different information requested is reasonably necessary in order for OCAHO to properly adjudicate unfair immigration-related employment practices cases.

For example, the "Respondent Business/Employer Information" section of the Form EOIR-58 asks for both the mailing address of the employer who allegedly discriminated against the complainant as well as the location where the complainant actually worked for the employer (if different from the mailing address). The mailing

address of the employer is necessary to satisfy 28 C.F.R. § 68.7(b)(2) and (5), and to enable OCAHO to serve a copy of the complaint on the respondent employer. The workplace address at which the complainant worked may also be necessary in order for OCAHO to determine the appropriate place for a hearing to occur, as we must give “due regard to the convenience of the parties and the witnesses in selecting a place for a hearing.” 28 C.F.R. § 68.5(b). By contrast, in the corresponding section of the IER charge form (Section 1, “Employer Information”), only the following fields are marked as “required”:

- Company (Employer) name
- City
- State

Providing only this basic information about the employer on the IER charge form would neither satisfy the requirements for an OCAHO complaint under 28 C.F.R. § 68.7, nor give OCAHO enough information to effect service of the complaint and the notice of hearing on the respondent employer. Accordingly, the additional information requested on Form EOIR-58 in the corresponding section is in fact not duplicative, but rather is necessary to ensure that the complaint can be properly served on the employer. As it is, OCAHO has often encountered significant difficulties with incorrect or incomplete addresses provided by complainants on the Form EOIR-58. Eliminating or substantially scaling back that section of the form would only increase those difficulties and delay adjudication of these complaints.

Similarly, the information required by the relevant sections of the IER charge form concerning the complainant's national origin and citizenship/immigration status is less comprehensive than the information requested by the corresponding sections of the Form EOIR-58. The additional information solicited by the Form EOIR-58 in this area is often necessary to determine whether OCAHO has jurisdiction over a particular individual's complaint.

As a general matter, all of the information collected by the Form EOIR-58 is information that OCAHO must collect from the complainant at some point during adjudication of all claims arising under 8 U.S.C. § 1324b. Therefore, complainants would be required to provide this information at some point in their proceedings in one form or another. It serves the interest of efficiency for both OCAHO and the parties before it to solicit as much of this information as possible at the outset of a case. The alternative to asking for this information at the complaint stage is for OCAHO Administrative Law Judges (ALJs) to issue an order (or series of orders) to the parties requesting the additional information omitted from the complaint. That process – including time for responses and replies – can be unduly time-consuming and increases the overall burden on both OCAHO and the public.

Accordingly, although some questions or sections of the Form EOIR-58 may seem duplicative of portions of the IER charge form, the Form EOIR-58 in fact requests more or different information than the IER charge form, and only to the extent necessary to properly and efficiently adjudicate claims of unfair immigration-related employment practices.

Comment: The commenter suggests that a third option should be added to the form regarding the complainant’s gender (other than simply offering “Male” and “Female” as options).

Response: OCAHO concurs with this comment. As the information solicited by this question is used by OCAHO only to know how to address the complainant in future correspondence, the Department proposes to revise the question to simply ask how the complainant would like to be addressed, and will provide an option for “Other” (in addition to “Mr.” or “Ms.”).

Comment: The comment argues that questions on the Form EOIR-58 about the complainant’s current immigration status should be abolished, noting that these questions may lead to confusion or chill participation among workers who may have lost their work authorization.

Response: OCAHO appreciates this comment and is sensitive to the concerns expressed by the commenter. However, an individual’s current immigration status is often an essential piece of information in determining whether OCAHO has jurisdiction over a complaint, or to assess the availability of potential remedies in the event the employer is found to have committed an unfair immigration-related employment practice. As with other pieces of essential information, the alternative to asking for that information on the Form EOIR-58 would require the ALJ to request that information by separate order, which is more time-consuming and burdensome

for both OCAHO and the parties. Therefore, we cannot eliminate those questions at this time.

Comment: The comment also asks the agency to rephrase certain questions that, in their view, “require[e] complainants to draw complex legal conclusions,” specifically referencing Section 6, Questions 3 and 4 on the Form EOIR-58.

Response: The phrasing of the questions referenced by the commenter is drawn directly from the language of the relevant statutory provisions of 8 U.S.C. § 1324b. As noted previously, OCAHO’s regulations require complaints to contain “[t]he alleged violations of law.” 28 C.F.R. § 68.7(b)(3). Phrasing these questions in accordance with the statutory language allows a complainant to satisfy this regulatory requirement for complaints by using the Form EOIR-58.

Comment: Finally, the comment suggests rephrasing Question 7 in Section 9 regarding workplace intimidation and retaliation in order to make it less “contentious” or “accusatory.”

Response: OCAHO appreciates this comment, and agrees that the question could be rephrased to better elicit the relevant information. Accordingly, the Department has proposed revising this question to largely follow the language suggested by the commenter.

If additional comments are received, they will be considered and incorporated where appropriate.

9. Payment or Gift to Claimants - EOIR does not provide any payment or gifts to individuals in exchange for the information provided in Form EOIR-58.
10. Assurance of Confidentiality – EOIR’s Office of the Chief Administrative Hearing Officer maintains the original complaint. EOIR staff members who process the complaint may access the Form EOIR-58. To the extent permitted by law, EOIR protects the confidentiality of the contents of the Form EOIR-58 and its attachments. EOIR would release information in accordance with the Privacy Act and the Freedom of Information Act.
11. Justification for Sensitive Questions - Any question that inquires into matters commonly considered as private is necessary for the Administrative Law Judge to adjudicate a section 274B complaint regarding alleged unfair immigration-related employment practices.
12. Estimate of Hour Burden
- | | |
|---|--------|
| a. Number of Respondents | 26 |
| b. Number of Responses per Respondent | 1 |
| c. Total Annual responses | 26 |
| d. Hours per response | 1 hour |
| e. Total annual hourly reporting burden | 26 |

The total annual reporting burden is derived by multiplying the number of respondents (26) by the frequency of response (1) by the number of hours per response (1 hour): 26 respondents x 1 response per respondent x 1 hour per respondent = 26 burden hours.

13. Estimate of Cost Burden - There are no capital or start-up costs associated with this information collection. The estimated public cost is zero.

There may be ancillary costs to respondents if they hire a private attorney to assist them with completing the Form EOIR-58. The Bureau of Labor Statistics reports that the median hourly wage for lawyers is \$61.03 per hour. For those respondents who proceed without an attorney, there is an estimated cost of \$10 per hour for completing the form (the individual's time and supplies) in lieu of the attorney cost. There are also no fees associated with filing the Form EOIR-58.

14. Estimated Cost to Federal Government - It is estimated that the annual government cost for printing, distributing, filing, processing and maintaining the Form EOIR-58 is \$1,459.42. This estimate was derived by adding the cost to process the total annual responses to the overhead costs to the agency. The annual cost to process the forms was derived by dividing the hourly wage to process the form (\$41.78) by the number of forms processed in one hour (1) multiplied by the total estimated annual responses (26) = \$1,086.28. The overhead cost to the agency is estimated to be 31% of the

annual cost to process the forms (\$336.74). The cost to print the 14-page form and instructions is estimated to be \$36.40.

15. Plans for Publication - EOIR does not intend to employ the use of statistics or the publication thereof for this collection of information.

16. Exceptions to Certification Statement - EOIR does not request an exception to the certification of this information collection.

Section B. Collection of Information Employing Statistical Methods

This collection does not employ statistical methods.

PAPERWORK CERTIFICATION

In submitting this request for OMB approval, I certify that the requirements of the Privacy Act and OMB directives have been complied with, including paperwork regulations, any applicable statistical standards or directives, and any other information policy directives promulgated under 5 CFR § 1320.

Christina Baptista
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12/2/2021

Date