

PUBLICATION

New EEOC Guidelines on National Origin Discrimination

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February 15, 2003

National origin has long been a protected class under Title VII of the Civil Rights Act of 1964 ("Title VII") and many state and local laws. It is unlawful for an employer to discriminate against an employee, job applicant, or former employee on the basis of that individual's national origin. In the past, national origin was the "stepchild" of Title VII, with relatively few legal claims being brought on that basis. The tides are changing, particularly in light of national events since September 11, 2001, and national origin discrimination claims are becoming more prevalent. Employers must be proactive in eliminating workplace discrimination that is based on national origin.

On December 2, 2002, the Equal Employment Opportunity Commission ("EEOC") promulgated new guidelines interpreting Title VII's prohibition against national origin discrimination. EEOC Chair Cari M. Dominguez explained that "[w]ith American society growing increasingly diverse, protection against national origin discrimination is vital to the right of workers to compete for jobs on a level playing field."

The EEOC's new guidelines address various areas of national origin discrimination, including hiring decisions, harassment, and language issues. This article explains national origin discrimination and provides steps employers can take to protect themselves from liability.

What Is National Origin?

A "national origin group" is an ethnic group of people who share a common language, culture, ancestry, or other similar social characteristics. National origin discrimination includes discrimination based upon the place from where an individual comes or the place from which an individual's ancestors come. An employment decision is based upon national origin when the decision is made on the basis of any of the following:

- Ethnicity, which includes an individual's membership in an ethnic group or lack of membership in an ethnic group;
- Physical, linguistic, or cultural traits that are closely associated with an ethnic group; or
- An employer's perception that an individual is a member of a particular national origin group.

Employment Decisions

Title VII's prohibition against national origin discrimination applies to all employment decisions including those related to the following areas:

- Recruitment
- Hiring
- Promotion
- Transfer
- Wages and benefits
- Work assignments
- Leave
- Training and apprenticeship programs
- Discipline

- Layoff and termination

Employers should take the following affirmative steps, among others, to ensure that national origin does not affect their employment decisions.

- Use a variety of recruitment and hiring techniques to increase the likelihood of a diverse pool of candidates;
- Establish objective criteria for evaluating candidates for hire, promotion, discipline, and termination, and place those criteria in writing;
- Implement a progressive discipline policy and treat similar incidents of work misconduct similarly;
- Establish anti-discrimination and anti-harassment policies that address discrimination based upon national origin in addition to discrimination based upon race, color, sex, religion, age, disability, and other classifications protected by federal, state, or local law.

Harassment

National origin harassment is the most commonly raised type of national origin discrimination claim. During the 2002 fiscal year, thirty percent of all charges of discrimination based upon national origin that were filed with the EEOC included a claim of national origin harassment. 2719 charges of national origin harassment were filed with the EEOC during the 2002 fiscal year.

Harassment violates Title VII when it is sufficiently "severe or pervasive" to create a hostile and abusive workplace. Whether national origin harassment violates the law depends upon the physical threat or intimidation involved, the frequency of the conduct; whether the conduct was hostile or patently offensive; the context of the harassment; and whether management responded appropriately when the harassment was reported.

Employers should implement policies prohibiting harassment and providing employees with a mechanism for complaining about alleged harassment. Employers should also respond promptly to complaints of harassment, investigate those complaints, and take appropriate disciplinary action. Employers should train their employees, especially supervisors, to ensure that the workplace remains free of harassment.

Language Issues

Linguistic characteristics are often a component of national origin or ethnicity. National origin discrimination includes discrimination based upon linguistic characteristics.

Foreign accents: An employer may not make employment decisions based upon a discernable foreign accent unless the accent materially interferes with the individual's performance of job duties. Rarely will a foreign accent interfere with an employee's performance of a job.

Fluency requirements: An employer may only require employees to be fluent in the English language if fluency is required for effective performance of the job in question. The level of fluency required for different jobs will vary, so employers should not impose one general fluency requirement for all job positions.

English-only rules: An employer may implement a rule requiring employees to speak English in the workplace only if the rule is justified by business necessity. In determining whether an English-only rule is justified by business necessity, the employer should evaluate the following: Evidence of safety justifications for the rule; Evidence of other business justifications, such as supervision or effective communication with customers; The likeliness that the rule would carry out the employer's objectives; The English proficiency of the workers affected by the rule; Whether an alternative to an English-only rule would accomplish the employer's purposes.

An employer may be required to notify employees about an English-only rule in English and the other languages spoken by employees.

Conclusion

National original discrimination claims are on the rise, and employers are likely to see more of these claims in the near future. By evaluating existing policies, implementing new policies, and training employees and supervisors, employers can take the steps necessary to avoid liability.