

EEOC Issues Revised National Origin Guidance

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The Equal Employment Opportunity Commission (EEOC) recently issued its [updated guidance](#) on national origin discrimination, and it contains no real surprises. Denominated an “EEOC Enforcement Guidance,” this sub-regulatory guidance does not have the force of law, but rather is “intended to communicate the Commission’s position on important legal issues” and – as the EEOC explains on its website – courts defer to such guidance when they find the EEOC’s positions persuasive. Most aspects of this guidance are not controversial, but on the issues where there is significant disagreement in the courts, employers and employees should regard the interpretations as controlling of the way EEOC investigators and attorneys will view complaints of [national origin discrimination](#).

What Does National Origin Discrimination Encompass?

The guidance defines prohibited discrimination as taking actions “because an individual (or his or her ancestors) is from a certain place or has the physical, cultural, or linguistic characteristics of a particular national origin group.” Places of origin may be countries, former countries (such as Yugoslavia) or geographic regions associated with a particular national origin group (such as Kurdistan or Acadia).

National origin discrimination also prohibits discrimination because of an individual’s national origin group or ethnic group, defined as a group of people sharing a common language, culture, ancestry, race or other social characteristics, such as Hispanics, Arabs and Roma.

National origin discrimination includes discrimination because of an individual’s physical, linguistic and/or cultural characteristics associated with a national origin group. According to the guidance, this means it could be unlawful discrimination to refuse to hire an individual because of an African accent or traditional African style of dress.

National origin discrimination also encompasses discrimination based on an employer’s beliefs about an individual’s national origin or ethnicity, even if the perception is erroneous.

Finally, national origin discrimination includes discrimination based on an individual’s association with someone of a particular national origin.

The guidance notes that national origin discrimination can occur in conjunction with discrimination on the basis of race and religion, and that individuals often complain of [discrimination on multiple bases](#) arising from the same set of facts.

[Title VII](#) does not define national origin, and there is little legislative history to illuminate what it meant to the drafters. Although the EEOC has consistently given the term the broadest possible meaning, courts have generally agreed with this approach, and it is congruent with the Supreme Court’s understanding in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), which held that national origin refers to the country from which an individual or his or her ancestors came, but that, by its terms, Title VII does not prohibit a requirement of U.S. citizenship.

Who is Protected from Discrimination Based on National Origin?

All employees and applicants for employment in the United States, regardless of citizenship, are protected from national origin discrimination. The guidance makes clear that where U.S. citizenship is a job requirement, as it is for most federal civil service employment, the failure to hire someone because he or she is not a U.S. citizen does not constitute national origin discrimination in violation of Title VII. Conversely, when U.S. citizenship requirements imposed by employers have the “purpose or effect” of discriminating on the basis of national origin, they may violate Title VII, as, for example, when such requirements are imposed for pretextual reasons.

The protection from national origin discrimination extends to undocumented workers. The EEOC guidance notes that undocumented workers may not be entitled to the full range of remedies for discrimination because, for example, if they

are not currently eligible to work legally in the United States, they could not obtain reinstatement. The guidance discusses human trafficking, which involves compelled labor that violates various criminal and immigration statutes, but which also may state claims for racial, sexual or national origin harassment in violation of Title VII.

Title VII also protects U.S. citizens working for U.S. corporations in foreign countries.

What Employment Decisions are Covered by the Prohibition on National Origin Discrimination, and What are the Governing Liability Standards?

The EEOC guidance identifies and provides examples of all the prohibited employment actions that may not be taken based on national origin, including recruitment, hiring, promotion, job assignment, discipline, demotion, discharge and harassment. The elements and proof standards for such discrimination claims are generally the same as for claims of race or sex discrimination.

For example, in the section discussing discrimination in recruitment and hiring, the guidance explains the EEOC's position on the joint liability of various entities it might regard as having an employment relationship with covered employees. The EEOC's message is that employers cannot escape liability for discrimination in recruitment, hiring, or job placement by delegating those decisions to placement agencies or staffing firms. If staffing firms, including temporary agencies and long-term contract firms, have sufficient employees to be covered employers and have the "right to exercise control over the means and manner of a worker's employment (regardless of whether they actually exercise that right)," they will be covered as "joint employers" along with the client employer. Although this standard has not been embraced by all courts, it has been the EEOC's consistent position for decades.

In another example of the EEOC guidance's consistency with other enforcement positions, this guidance makes it clear that making discriminatory hiring or job assignment decisions based on the preferences of coworkers, customers or clients constitutes unlawful discrimination.

Additionally, the guidance discusses the "mixed motives" theory of employer liability for discrimination, reminding employers that the 1991 amendment codifying the mixed motives liability standard applies to cases of national origin discrimination. This means that if employment decisions are motivated by both permissible and impermissible reasons, the employer will be liable for discrimination. If an employer can prove it would have made the same decision based on the non-discriminatory reason alone, the victim of discrimination can obtain only limited relief, including declaratory and injunctive relief and attorney's fees and costs, but not reinstatement, back pay or damages.

The guidance also explains that the liability standards for harassment on the basis of national origin are the same as those governing cases of racial and sexual harassment. National origin harassment may take the form of ethnic slurs, ridicule, intimidation, workplace graffiti, physical violence or other offensive conduct directed toward an individual because of her birthplace, ethnicity, culture, language, dress or foreign accent, and may be perpetrated by supervisors, coworkers, customers or commercial contacts. If it is sufficiently severe or pervasive to alter terms and conditions of employment, employers will be liable under the familiar standards applicable in other harassment cases: (1) strict liability if a supervisor's harassment culminates in a tangible employment action; (2) liability for a supervisor's creation of a hostile environment subject to an affirmative defense in which the employer can avoid liability if it can prove it had an effective policy and complaint procedure and the employee failed to take advantage of the employer's preventive measures; and (3) liability for harassment by coworkers or nonemployees if the employer knew about the harassment and failed to take immediate corrective action.

Employer Standards and Policies Regarding Language, Accent and English Fluency

There is one form of national origin discrimination that has no analogue to discrimination on other bases - discrimination on the basis of language. The EEOC has consistently taken the position since 1980 that one's native language is inextricably tied to national origin and that discrimination on the basis of the language an individual speaks therefore may potentially violate Title VII, although there are a number of legitimate reasons that might validate otherwise facially discriminatory policies. The guidance discusses three specific types of employer policies and practices related to language.

Accent Discrimination

The guidance explains that an accent can reflect whether a person lived in another country or grew up speaking a language other than English, and therefore is intertwined with national origin. For that reason, courts and the EEOC carefully scrutinize decisions not to hire or fire individuals because of their accents, considering such decisions justified only if there is evidence that effective spoken communication in English is required to perform job duties and that the individual's accent materially interferes with his or her ability to communicate in spoken English.

Fluency Requirements

Employer policies requiring English fluency or proficiency are permissible only if such proficiency is

required for the effective performance of the position in question. Employers risk liability if they have uniform fluency requirements for all jobs regardless of the actual need for English proficiency in some positions, or if they impose a higher standard of proficiency than is actually needed for the job.

English-Only Rules

Although some courts have criticized the EEOC's perspective on employer policies requiring the use of English in the workplace, the EEOC's guidance reiterates its longstanding interpretation and provides numerous examples to clarify its rationale. The essence of the EEOC's position is that policies requiring the use of English in the workplace necessarily have an adverse effect on individuals whose native language is not English and thus may violate Title VII unless justified. The adverse effects the EEOC has identified are that (1) those whose primary language is not English are prohibited from communicating at work in their most effective language while native English-speaking employees are not so limited; (2) those whose primary language is not English may be subjected to discipline and termination for speaking in their most effective language, while there is no comparable risk for native English-speaking employees; and (3) an English-only rule "is likely in itself to 'create an atmosphere of inferiority, isolation, and intimidation' that constitutes a 'discriminatory working environment.'"

The EEOC considers blanket rules that require employees to speak only English at all times, including on breaks and during lunch, to be presumptively unlawful.

The EEOC evaluates English-only rules that are more limited by requiring employers to demonstrate that the policy is job related and consistent with business necessity by "providing detailed, fact-specific, and credible evidence" demonstrating the business purpose of requiring employees to speak a common language "is sufficiently necessary to safe and efficient job performance or same and efficient business operations to override its adverse impact, and that it is narrowly tailored to minimize any discriminatory impact based on national origin."

The EEOC Identifies "Promising Practices" to Reduce the Risk of Title VII Violations Based on National Origin Discrimination

At the end of the guidance the EEOC suggests various practices that would minimize potential violations of the prohibition on national origin discrimination, but would also minimize potential discrimination on all other bases as well. These practices include:

- Using a variety of recruitment methods to attract as diverse a pool of job seekers as possible;

- Stating that the employer is an "equal opportunity employer;"

- Having clearly defined criteria for employment decisions;

- Developing objective, job-related criteria for identifying the unsatisfactory performance or conduct that can lead to discipline, demotion or discharge;

- Recording the business reasons for disciplinary or performance-related actions and sharing them with the employee;

- Communicating that harassment will not be tolerated and that employees who violate that policy will be punished;

- Communicating that those who complain will be protected from harassment; and

- Ensuring that all policies are communicated effectively to all employees, which may require translating and offering training in the languages spoken by employees.