

EEOC UPDATES GUIDANCE REGARDING NATIONAL ORIGIN DISCRIMINATION

On November 21, the EEOC announced the release of its updated Enforcement Guidance on National Origin Discrimination (“Guidance”), representing the first official guidance on this topic in 14 years. The new Guidance replaces the EEOC Compliance Manual, Volume II, Section 13: National Origin Discrimination, previously published in 2002. The Guidance may be accessed [here](#).

The EEOC simultaneously released a Questions and Answers document (available [here](#)) and a Small Businesses Fact Sheet (available [here](#)) summarizing the Guidance.

Background

The Guidance notes in the preamble that the American workforce is becoming increasingly diverse and that immigrant workers are present in every occupation in the United States, including many of the “largest growth occupations” such as health care and home health. The Guidance was published quickly on the heels of the October 16, 2016 deadline requiring health programs or activities receiving federal funding (“Covered Entities”) to post nondiscrimination notices and taglines indicating the free availability of language assistance in at least the top 15 non-English languages spoken in the Covered Entity’s state, in accordance with the Final Rule implementing Section 1557 of the Affordable Care Act (additional information on Section 1557 is available [here](#)).

This unified approach from multiple enforcement agencies confirms the government’s continued focus on regulating health care, increasing workplace diversity and protecting employees and others from discriminatory treatment based upon their national origin.

Broader Definition of National Origin Discrimination

The Guidance continues to define national origin discrimination to include discrimination based on an individual’s (or his or her ancestors’) place of origin, ethnicity or physical, linguistic or cultural traits, as well as a perception that an individual is from a particular country or belongs to a particular national origin group. The updated Guidance also broadens the definition of national origin discrimination to expressly include:

- Employment discrimination against an individual because of his or her association with someone of a particular national origin; and
- Employment discrimination based on citizenship status if it has the purpose or effect of discriminating based on national origin.

Focus on “Intersectional” Discrimination

While the EEOC’s prior compliance manual publication noted that national origin discrimination may often overlap with Title VII’s prohibition against discrimination based on race and religion, the updated Guidance includes an express prohibition on what is now dubbed “intersectional discrimination,” which the EEOC defines as occurring when someone is discriminated against because of the combination of two or more protected bases. For example, discrimination motivated by a stereotype about Hispanic women is prohibited by Title VII, even if the employer could demonstrate that it did not discriminate against non-Hispanic women or Hispanic men.

Language Requirements

The Guidance notes that between 2010 and 2014, an average of 20.9 percent of the population spoke a language other than English at home. Because linguistic characteristics are frequently associated with national origin, the EEOC closely scrutinizes employment decisions based on language to ensure they do not violate Title VII. The EEOC takes the following positions with respect to language requirements in the workplace:

- **Accent:** To legitimately make an employment-related decision based on an individual’s accent, the employer must provide evidence that the accent “interferes materially with job performance” by demonstrating that: (1) effective spoken English is required to perform job duties; and (2) the individual’s accent materially interferes with his or her ability to communicate in spoken English.” The Guidance reiterates that the fact that an individual has a discernible accent does not necessarily mean that accent interferes with the verbal

communication requirements of the position.

- *Fluency*: English fluency or proficiency is permissible only where it is required for the effective performance of the specific position at issue. The EEOC cautions against applying uniform fluency requirements to a broad range of dissimilar positions and recommends that employers assess fluency requirements on a case-by-case basis. Similarly, employers may require fluency in a language other than English only where it is required for the effective performance of the specific position at issue.
- *English Only or Restrictive Language*: The Guidance reiterates the EEOC's long-standing position that "rules requiring employees to speak English in the workplace at all times will be presumed to violate Title VII," noting that such language-restrictive policies may be applied "only to those specific employment situations for which they are needed to promote safe and efficient job performance or business operations." Employers must also provide adequate notice of restrictive language policy, including effectively communicating the language policy to employees, as well as the consequences for violating that rule.

Other Notable Issues

While much of the Guidance reiterates Title VII's strict prohibition of workplace discrimination and harassment based on national origin, the Guidance reiterates and clarifies the EEOC's position on a number of key issues, including the following.

- *Human Trafficking*. The Guidance includes a new section noting Title VII's applicability in human trafficking cases if an employer's conduct is directed at an individual or group based on national origin, or other protected classification, such as where employers subject legally recruited employees of a particular national origin to less favorable pay, hours and working conditions. The Guidance further notes that cases involving human trafficking cases often include employer conduct that amounts to unlawful harassment and the forced nature of the labor reasonably supports a hostile work environment.
- *Affirmative Action*. Although Title VII prohibits an employer from recruiting or hiring on the basis of national origin, the Guidance notes that "Practices aimed at increasing the overall diversity of the applicant pool, such as recruiting at minority-serving institutions, that do not exclude any particular national origin groups would **not** implicate Title VII's bar on national origin discrimination." (emphasis added)
- *Joint Employers*. Consistent with the increased focus on joint employer relationships (see, e.g., <http://blogs.hallrender.com/blog/joint-employment-nlrb-broadly-redefines-the-standard/>), the Guidance notes that where two employers, such as a staffing/temporary agency and client employer, both have the right to control a worker's employment, both may be subject to liability for discrimination based on national origin and other protected characteristics.
- *Social Security Numbers*. The EEOC takes the position in the Guidance that a policy or practice of screening out new hires or candidates who do not have a social security number implicates Title VII if it disproportionately screens out work-authorized individuals of a certain national origin.
- *Customer Preference*. The Guidance reiterates that employers may not make employment decisions based upon the discriminatory preferences of coworkers, clients or to maintain a specific "corporate look" or "image."
- *Security Requirements*. The Guidance reiterates that employers may justify employment decisions based on national security requirements only where those requirements are imposed in the interest of the national security of the United States under a security program in effect pursuant to, or administered under, a federal statute or Executive Order.

Promising Practices

The Guidance concludes with a two-page summary entitled "Promising Practices," which the EEOC defines as practices employers may wish to consider implementing because they may reduce the risk of violations. However, the Commission is quick to point out that "adopting these practices does not insulate an employer from liability or damages for unlawful actions." The "promising practices" outlined in the Guidance include but are not limited to:

- Using a variety of recruitment tools to attract a diverse pool of jobseekers, rather than relying on "word of mouth" recruiting;
- Advertising that an employer is an "equal opportunity employer" and notifying applicants of any language qualifications with other job-related qualifications;

- Establishing objective written criteria for making employment decisions that relates to the employer's business needs and communicating that criteria to managers and other decision-makers to ensure it is uniformly applied;
- Developing objective, job-related criteria for identifying unsatisfactory conduct that could result in discipline, demotion or discharge and implementing a progressive discipline policy aimed at correcting any employee misconduct;
- Documenting accurately the business reasons for disciplinary or performance-related actions and communicating those reasons with the employee; and
- Communicating clearly the company's strict prohibition against discrimination and harassment with all employees, including temporary and contract workers, and effectively and clearly communicating procedures for reporting harassment.

The Commission further recommends that because policies are not effective if they cannot be understood by employees, "employers are advised to consider translating their policies into the languages spoken by employees with limited English skills, conducting training on the policies in these languages, and providing interpreters or other language assistance to ensure that employees can report harassment confidentially." The notes to the Guidance contains information about the laws enforced by the EEOC in several languages, including Arabic, Chinese, Haitian, Creole, Korean, Russian, Vietnamese and Spanish, as well as **fact sheets** for small business owners in numerous additional languages.

Practical Takeaways

Employers should review and update their recruitment and employment policies and practices to minimize any outstanding risk relating to national origin discrimination, including the potential implementation of the EEOC's recommended "promising practices." Health care employers who are also Covered Entities subject to Section 1557 of the Affordable Care Act should also review their nondiscrimination postings, websites and taglines to ensure compliance. Managers and supervisors should be advised of the increased breadth of the recent Guidance and reminded of the company's strict prohibition on discrimination and harassment based on legally protected characteristics, including but not limited to an employee or applicant's national origin.

If you have questions about this topic, please contact Jennifer Gonzalez at (248) 457-7840 or jgonzalez@hallrender.com or your regular Hall Render attorney.