National Origin Discrimination Compliance Guide

EEO

Employer Knowledge Series

A comprehensive guide to preventing and eradicating national origin discrimination in the workplace, complying with applicable laws, and avoiding costly employee lawsuits.

personnel concepts
EMPLOYER KNOWLEDGE SERIES

National Origin Discrimination in Employment Compliance Guide

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About this Guidebook / Disclaimer

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According to the U.S. Department of Labor's Report entitled "Futurework: Trends and Challenges for Work in the 21st Century", by the year 2050, half of the U.S. population will be comprised of minorities and immigration will account for two-thirds of population growth. Diversity in the workplace is our future and learning to work together and communicate will determine the level of success that businesses are able to achieve. Unfortunately, current statistics indicate that we have a long way to go. In Fiscal Year 2008, the EEOC received 10,601 charges of national origin discrimination of which monetary benefits for charging parties totaled $25.4 million (not including monetary benefits obtained through litigation).

Although federal law requires at least 15 employees on staff to file a national origin discrimination claim, individual state law may allow a discrimination claim with as little as one employee. Therefore, even if a company has less than 15 employees, a national origin discrimination claim can still be filed with either the state's administrative agency, in court or both. Employers can abide by the federal laws outlined by the EEOC to ensure that they are in compliance with their state laws.

An anti-discrimination policy and prevention program, as outlined herein, can only be effective if taken seriously and followed through. Each company is unique. The needs of your company should be examined and implemented into the program in order to make it successful. It is essential that the employer demonstrate at all times their personal concern for their employees and the priority placed on them in your workplace. The policy must be clear. The employer shows its importance through their own actions.

 Every effort has been made by the author to assure accuracy and completeness of the information contained herein. This guidebook follows the guidelines recommended by the DOL and the EEOC and is provided with the understanding that Personnel Concepts or any of its affiliates cannot be held responsible for errors or omissions, changes in law, regulations or interpretations thereof. This guidebook is not intended to be legal interpretation of any law or regulation.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting or other professional services. If legal advice or other expert assistance is required, the service of a competent professional must be sought. – From a Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers.

Implementation Procedures

The following implementation procedures are intended to provide specific instructions for correctly utilizing the various components of our National Origin Discrimination Compliance Kit. If you have additional questions about this guidebook or other kit components, please contact Personnel Concepts at 800-333-3795.

1. Post the enclosed National Origin Discrimination Policy Poster conspicuously in the workplace where legal notices (i.e. policy statements and labor law postings) are customarily posted. The purpose of this poster is to acknowledge your coverage under Title VII and to notify affected workers that national origin discrimination is strictly prohibited in the workplace.

2. Review the Introduction to National Origin Discrimination and Frequently Asked Questions that are included in this section. This overview is intended to ensure that you understand your establishment's obligations under current national origin discrimination law.

3. Review Sections II thru IV for a thorough explanation of the various types of national origin discrimination (equal access to jobs, harassment, and language issues).

4. Distribute the enclosed National Origin Discrimination Training Handouts to supervisors, managers, and other affected individuals to ensure that your workforce understands what constitutes unlawful national origin discrimination.

5. Review Section V, "Recent Court Decisions" to determine if recent cases have involved situations, decisions, or issues that are currently present in your workplace.

6. Refer to the Regulatory Text contained in this guidebook on an as-needed basis when processing an employee complaint.

7. Use the enclosed EEO Incident Reports to document any employee allegation of national origin discrimination (bias, disparate treatment, harassment, etc.). These complaints should be investigated and resolved immediately by the individuals within your organization who handle employee complaints and grievances.

Contact a Compliance Specialist at 800-333-3795 to inquire about other products pertaining to employment discrimination, including the EEO Compliance Program, the Space Saver-7 All-On-One Workplace Policy Poster, and the Harassment in the Workplace Program.

Introduction to National Origin Discrimination

National origin discrimination became a major factor in employment litigation following the attacks of September 11, 2001. Since then, the Equal Employment Opportunity Commission (EEOC) has recorded a substantial increase in the number of charges alleging discrimination based on national origin. Forms of discrimination resulting from 9/11 include employers refusing to hire employees of a particular nationality because they are afraid that it would make their customers uncomfortable or requiring job applicants to undergo a more extensive background check because they belong to a particular ethnicity.

Whether an employee or job applicant's ancestry is Mexican, Ukrainian, Filipino, Arab, American Indian, or any other nationality, he or she is entitled to the same employment opportunities as anyone else. The EEOC enforces the federal prohibition against national origin discrimination in employment under Title VII of the Civil Rights Act of 1964, which covers employers with fifteen or more employees.

A "national origin group," often referred to as an "ethnic group," is a group of people sharing a common language, culture, ancestry, and/or other similar social characteristics. Title VII prohibits employment discrimination against any national origin group, including larger ethnic groups, such as Hispanics and Arabs, and smaller ethnic groups, such as Kurds or Roma (Gypsies). National origin discrimination includes discrimination against American Indians or members of a particular tribe.

Employment discrimination against a national origin group includes discrimination based on:

> **Ethnicity:** Employment discrimination against members of an ethnic group, for example, discrimination against someone because he is Arab. National origin discrimination also includes discrimination against anyone who does *not* belong to a particular ethnic group, for example, less favorable treatment of anyone who is not Hispanic.
>
> **Physical, linguistic, or cultural traits:** Employment discrimination against an individual because she has physical, linguistic, and/or cultural characteristics closely associated with a national origin group, for example, discrimination against someone based on her traditional African style of dress.
>
> **Perception:** Employment discrimination against an individual based on the employer's belief that he is a member of a particular national origin group, for example, discrimination against someone perceived as being Arab based on his speech, mannerisms, and appearance, regardless of how he identifies himself or whether he is, in fact, of Arab ethnicity.

No one can be denied equal employment opportunity because of birthplace, ancestry, culture, linguistic characteristics common to a specific ethnic group, or accent. Equal employment opportunity cannot be denied because of marriage or association with persons of a national origin group; membership or association with specific ethnic promotion groups; attendance or participation in schools, churches, temples or mosques generally associated with a national origin group; or a surname associated with a national origin group. Examples of violations covered under Title VII include:

Employment Decisions

Title VII prohibits any employment decision, including recruitment, hiring, and firing or layoffs, based on national origin.

Harassment

Title VII prohibits offensive conduct, such as ethnic slurs, that creates a hostile work environment based on national origin. Employers are required to take appropriate steps to prevent and correct unlawful harassment. Likewise, employees are responsible for reporting harassment at an early stage to prevent its escalation.

Language

- **Accent discrimination**

  An employer may not base a decision on an employee's foreign accent unless the accent materially interferes with job performance.

- **English fluency**

  A fluency requirement is only permissible if required for the effective performance of the position for which it is imposed.

- **English-only rules**

  English-only rules must be adopted for nondiscriminatory reasons. An English-only rule may be used if it is needed to promote the safe or efficient operation of the employer's business.

Title VII's prohibition against national origin discrimination often overlaps with the statute's prohibitions against discrimination based on race or religion. The same set of facts may state a claim of national origin discrimination and religious discrimination when a particular religion is strongly associated, or perceived to be associated, with a specific national origin. Similarly, discrimination based on physical traits or ancestry may be both national origin and racial discrimination. If a claim presents overlapping bases of discrimination prohibited by Title VII, each of the pertinent bases should be asserted in the charge. For example:

National Origin and Religious Discrimination

Thomas, who is Egyptian, alleges that he has been harassed by his coworkers about his Arab ethnicity. He also has been subjected to derogatory comments about Islam even though he has told his coworkers that he is Christian. Thomas' charge should assert both national origin and religious discrimination.

National Origin and Race Discrimination

> Toni alleges that she was not hired for a server position in a Greek restaurant based on her Chinese ethnicity and physical features. Toni's charge should assert both national origin and race discrimination.

A significant difference between Title VII's coverage of national origin and religion relates to accommodation. Title VII only requires accommodation of *religious* practices. Pursuant to this requirement, an employer must modify workplace policies that conflict with religious practices unless doing so would result in an undue hardship to the operation of the employer's business. For example, an employer would be required to provide an exception to a dress code to accommodate an employee's religious attire unless doing so would result in undue hardship. If the modification imposed only a minor financial or administrative burden on the employer, it would not impose an undue hardship.

While accommodation requirements do not apply to national origin, Title VII prohibits employers from imposing more restrictive workplace policies on some national origin (or religious) groups than on others. For example, an employer may not require that Hispanic workers wear business attire while permitting non-Hispanic workers in similar positions to wear more casual attire. However, an employer could impose the same dress code on all workers in similar jobs, regardless of their national origin, as long as the policy was not adopted for discriminatory reasons and is enforced evenhandedly.

The same laws that prohibit discrimination based on a protected class also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding. An employer may not fire, demote, harass, or otherwise "retaliate" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination.

Frequently Asked Questions

Q: What is Equal Employment Opportunity (EEO)?
A: EEO is the principle of eliminating discriminatory barriers as a means of ensuring fair and equal treatment of all individuals who are employed or seeking employment. Federal and State laws prohibit employment discrimination based on race, color, sex, religion, national origin, age, disability, and prohibit retaliation for opposing job discrimination, filing a charge, or participating in proceedings under these laws.

Q: How is discrimination defined?
A: Black's Law Dictionary defines discrimination as the failure to treat all persons equally where no reasonable distinction can be found between those favored and those who are not favored.

In other words, discrimination is the unfair treatment or denial of standard privileges of employment (such as benefits, working hours, pay increases, transfers, or promotions) based on one's race, age, sex, nationality, pregnancy, religion, marital or veteran status, or handicap whether physical or mental.

Q: What is intentional discrimination?
A: Intentional discrimination occurs when an employment decision is affected by the person's race. It includes not only racial animosity, but also conscious or unconscious stereotypes about the abilities, traits, or performance of individuals of certain racial groups.

Q: What law governs national origin discrimination and to whom does it apply?
A: Title VII of the Civil Rights Act of 1964 (Title VII) prohibits race, color, religion, sex, and national origin discrimination. Title VII applies to employers with fifteen (15) or more employees.

Q: What employment actions are prohibited by Title VII?
A: Title VII prohibits race and color discrimination in every aspect of employment, including recruitment, hiring, promotion, wages, benefits, work assignments, performance evaluations, training, transfer, leave, discipline, layoffs, discharge, and any other term, condition, or privilege of employment. Title VII prohibits not only intentional discrimination, but also practices that appear to be neutral, but that limit employment opportunities for some racial groups and are not based on business need.

Q: If a company has less than 15 employees, are they exempt from discrimination laws?
A: No. States generally have their own specific statutes addressing discrimination. Federal law requires at least 15 employees on staff to file a discrimination claim while individual state law may allow a discrimination claim with as few as one employee. Therefore, even if a company has less than 15 employees, a discrimination claim can still be filed with either the state's administrative agency, in court or both.

Q: Who enforces this law?
A: The U.S. Equal Employment Opportunity Commission (EEOC).

Q: What is national origin discrimination?
A: National origin discrimination means treating someone less favorably:

- because that person (or his or her ancestors) comes from a particular place -- i.e., a country;

- former country; or a place that has never been a country but is closely associated with a national origin group, such as Kurdistan;
- because of his or her ethnicity or accent;
- because it is believed that he or she has a particular ethnic background; or
- because of the person's marriage or other association with a person(s) of a particular national origin.

A national origin group or "ethnic group," is a group of people sharing a common language, culture, ancestry, and/or other similar social characteristics. Title VII prohibits employment discrimination against any national origin group, including larger ethnic groups, such as Hispanics and Arabs, and smaller ethnic groups, such as Kurds or Roma (Gypsies). National origin discrimination also includes discrimination against American Indians or members of a particular tribe.

Q: May an employer ever base an employment action on an individual's foreign accent or limited English proficiency?
A: An employer may consider an employee's foreign accent if the individual's accent materially interferes with the ability to perform job duties. This assessment depends upon the specific duties of the position in question and the extent to which the individual's accent affects his or her ability to perform job duties. Similarly, an English fluency requirement should reflect the actual level of proficiency required for the position for which it is imposed. The following example illustrates these principles:

Jorge, a Dominican national, applies for a sales position with XYZ Appliances, a small retailer of home appliances in a non-bilingual, English-speaking community. Jorge has very limited skill with spoken English. XYZ notifies him that he is not qualified for a sales position because his ability to effectively assist customers is limited. However, XYZ offers to consider him for a position in the stock room. Under these circumstances, XYZ's decision to exclude Jorge from the sales position does *not* violate Title VII.

Q: May employers adopt policies that require employees to speak only English in the workplace?
A: An English-only rule may be used if it is needed to promote the safe or efficient operation of the employer's business. Some situations in which business necessity would justify an English-only rule include: communications with customers, coworkers, or supervisors who only speak English; emergency situations in which workers must speak a common language to promote safety; and cooperative work assignments in which a common language is needed to promote efficiency. An employer's use of an English-only rule should relate to specific circumstances in the workplace.

Q: Can a person be discriminated against for associating with a person of another race or national origin group?
A: No. The law prohibits discrimination against a person based on the race or national origin of a spouse, family member, friend or associate. Likewise, the law forbids discrimination against an individual because of his membership in an organization that advances the interests of a certain racial or national origin group.

Q: What types of dress codes may an employer adopt?
A: A dress code must not treat some employees less favorably because of their national origin. For example, a dress code that prohibits certain kinds of ethnic dress, such as traditional African

or Indian attire, but otherwise permits casual dress would treat some employees less favorably because of their national origin. An employer may require all workers to follow a uniform dress code even if the dress code conflicts with some workers' ethnic beliefs or practices. However, if the dress code conflicts with *religious* practices, the employer must modify the dress code unless doing so would result in undue hardship.

Q: May an employer require U.S. citizenship?
A: Citizenship requirements generally do not violate Title VII. Like other employment policies, however, citizenship requirements may not be adopted for discriminatory reasons. Citizenship requirements also must be enforced evenhandedly. For example, an employer may not refuse to hire Egyptian citizens for certain positions based on their lack of U.S. citizenship while hiring British citizens for the same positions. In addition, while Title VII does not prohibit citizenship discrimination, the Immigration Reform and Control Act of 1986 (IRCA) prohibits employers with four or more employees from discriminating because of citizenship status with respect to hiring, referral, or discharge. IRCA's nondiscrimination requirements are enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, at the Department of Justice.

Q: Does Title VII's prohibition against national origin discrimination also apply to American-born employees?
A: Title VII protects every employee or applicant against discrimination based on his or her own national origin, including people born in the United States.

Q: Are foreign nationals protected by Title VII?
A: Foreign nationals employed in the United States are protected by Title VII to the same extent as U.S. citizens. However, because of immigration policy, the remedies available to an individual without proper work authorization may be limited.

Q: What is national origin harassment?
A: National origin harassment violates Title VII when it is so severe or pervasive that the individual being harassed reasonable finds the work environment to be hostile or abusive. Harassment based on national origin can take many different forms, including ethnic slurs, workplace graffiti, or other offensive conduct directed towards an individual’s birthplace, ethnicity, culture, or foreign accent. A hostile work environment may be created by the actions of supervisors, coworkers or even non-employees, such as customers or contractors.

An isolated incident would not normally create a hostile work environment, unless it is extremely serious (e.g., a national origin motivated physical assault or a credible threat of one, or use of a derogatory term, such as wetback, etc.). On the other hand, an incident of harassment that is not severe standing alone may create a hostile environment when frequently repeated.

Q: How can employers prevent national origin harassment?
A: The most important step for an employer in preventing harassment is clearly communicating to employees that harassment based on national origin will not be tolerated and that employees who violate the prohibition against harassment will be disciplined. Other important steps include adopting effective and clearly communicated policies and procedures for addressing complaints of national origin harassment, and training managers on how to identify and respond effectively to harassment. By encouraging employees and managers to report harassing conduct at an early stage, employers generally will be able to prevent the conduct from escalating to the point that it violates Title VII.

An employer is liable for harassment by a supervisor if the employer failed to take reasonable care to prevent and promptly correct the harassment or if the harassment resulted in a tangible job action (termination, demotion, less pay, etc.). An employer is liable for harassment by coworkers or non-employees if it knew or should have known of the harassment and failed to take prompt corrective action.

Q: How will a company know if a charge of discrimination has been filed against them?
A: The EEOC will notify the employer within 10 days of receiving a charge. Notification normally includes a copy of the charge briefly identifying the charging party, the basis (e.g., national origin,) and issue(s) (e.g., hiring, promotion, discharge, etc.) of the allegation, and the date(s) of the alleged discrimination. Ordinarily, a plain language explanation of the EEOC charge process will be included, as well as explanations of the employer's obligation to retain records pertaining to the charge and of the non-retaliation provisions of the EEOC laws. An invitation to mediate the charge may also be included in the notification package.

Q: What can be expected to happen in an EEOC investigation?
A: After a charge is filed, an employer may be asked to provide a statement of position responding to the allegations in the charge. They may also be asked to provide documents or information related to the subject of the EEOC's investigation. Additionally, the EEOC may ask to visit the worksite or to interview some employees. Cooperation with EEOC requests for information is helpful to the EEOC in investigating charges. When an employer refuses to provide information, or does not do so in a reasonably timely manner, the EEOC may issue a subpoena. Employers may retain an attorney to represent them during the EEOC's handling of the charge but they are not required to do so.

Q: What remedies are available for unlawful discrimination via EEOC enforcement?
A: Under the EEOC-enforced laws, the remedies for unlawful discrimination include:

- An order to eliminate discriminatory practices
- Hiring, wage adjustments, promotion or reinstatement, depending upon the nature of the action taken against the individual monetary remedies
- Monetary remedies including lost wages and prejudgment interest, compensatory damages, and punitive damages (Cases in which the employer acts with reckless disregard of the federally protected rights of the individual)

  The sum of punitive damages and future compensatory damages may not exceed the following amounts, per person:

  $50,000 for employers with 15-100 employees
  $100,000 for employers with 101-200 employees
  $200,000 for employers with 201-500 employees
  $300,000 for employers with more than 500 employees

Q: What kinds of notices, posters, policies, and forms should I have implemented in my place of business to help me avoid discrimination lawsuits?
A: To ensure compliance with pertinent labor laws and avoid potential liability in discrimination claims, employers must educate themselves, their supervisors, and managers about the legal issues that affect the workplace, post mandatory notices, and document complaints and

investigations. The following is a list of forms, notices, and documents pertinent to lawsuit prevention and legal compliance.

- Federal “Equal Opportunity is the Law” EEOC poster;
- Your state fair employment / human rights poster;
- Clear policies on harassment and discrimination that describes how to report a complaint and how it will be investigated by the company;
- A policy that describes the employer’s commitment to providing equal opportunity to all applicants and employees;
- Employee complaint forms.

Employment Practices

Recruitment

Title VII prohibits employers from engaging in recruitment practices that discriminate on the basis of national origin. Thus, an employer may not recruit individuals belonging to some national origin groups while deliberately not recruiting members of other national origin groups. Nor may an employer adopt certain recruitment practices, such as word-of-mouth recruitment, where such practices have the purpose or effect of discriminating against particular national origin groups.

Word-of-mouth referrals can be an effective way to recruit employees but only when it is done in a diverse workplace. If the workplace is predominately of a particular population then it would prevent equal employment opportunity and not reflect the diversity in a qualified labor market. Similarly, unions that are not racially diverse should avoid relying solely on member referrals as the source of new members.

It would also be a violation of Title VII to recruit people from a largely homogeneous source (meaning a source that has people predominantly of the same national origin or makeup) if doing so has an intentional purpose or if it has a significant national origin impact and cannot be justified as job related and consistent with business necessity. For example, if a city which is predominately Anglo-Saxon is hiring for their civic center and they are next to a city that has high Hispanic population but they only hire its own residents and refuse to advertise the position in the adjoining city, then they would be violating Title VII. Likewise, if a company recruits exclusively at a predominantly Hispanic school when they have access to a range of sources, they too would be violating Title VII.

The process of screening applicants can be an area susceptible to discrimination. National origin obviously cannot be used as a screening criterion. Nor may employers use a screening criterion that has a significantly disparate national origin impact unless it is proven to be job related and consistent with business necessity. For example, if a company is doing a search for an employee and they receive a number of resumes, it would be a violation to eliminate from the pile applicants that live in certain zip codes that are from areas known to be predominantly Arab or Hispanic.

Because employment agencies are covered by Title VII, they may not comply with requests from employers to engage in discriminatory recruitment or referral practices. Thus, a placement agency may not honor a client request to exclude Arab or South Asian applicants. Recruiters also may not independently screen out job seekers or applicants on the basis of national origin, religion, or any other characteristic covered by Title VII.

Finally, coverage of Title VII also applies to temporary agencies with respect to referrals and treatment of employees on the job. For instance, if a temporary agency learns that one of its employees was involuntarily transferred by a client from a position that involves public contact to a lower-paying position because of perceptions about her national origin, the agency should insist that the client return the employee to the former position. If the client refuses, the agency should offer to assign the worker to another client at the same rate of pay, and decline to assign other employees to the same worksite unless the client changes its discriminatory practices. A temporary agency that fails to take reasonable steps to remedy discrimination by a client may be jointly liable for any discriminatory actions taken against the agency's employees while assigned to the client.

Best Practices

A common employer practice is to use a variety of recruitment and hiring techniques, some of which are low cost, including job fairs and open houses, professional associations, search firms, and internships and scholar programs. This approach casts a wide net for talent and is more likely to result in a diverse pool of job seekers. Specialized publications or websites, including those directed to particular communities, may be effective tools for these purposes. Some recruitment methods, such as word-of-mouth hiring, are less likely to reach a diverse pool of job seekers and may tend to reinforce the make-up of the existing work force to the exclusion of other qualified individuals.

Employment advertisements should notify prospective applicants of all qualifications, including any qualifications related to language ability. For example, employment advertisements for positions where English skills are required by business necessity should specify such requirements. Advertisements should state that the employer is an "equal opportunity employer."

Hiring, Promotion and Assignment

In addition to recruiting, Title VII prohibits hiring, promotion, and assignment decisions that are based on national origin. For example:

Anu is a woman of Bangladeshi ancestry who wears a sari. She is offered a position at XYZ Bakery after a phone interview. When she reports for the first day of work, she is told by the manager who interviewed her that the bakery has found someone "better suited" for the position. Anu files an EEOC charge alleging discrimination based on national origin. She believes that the bakery's manager changed his mind about hiring her after meeting her in person and seeing that she is South Asian. The EEOC investigation reveals that the bakery hired a Hispanic woman for the position one week after turning Anu away and that Anu and the selectee possessed comparable qualifications. Under the circumstances, the evidence establishes that the employer has provided a false reason for its action as a pretext for unlawful discrimination.

Customer Preference

In addition, employers may not rely on coworker, customer, or client discomfort or preference as the basis for a discriminatory action. If an employer takes an action based on the discriminatory preferences of others, the employer is also discriminating. This issue has become especially prevalent since terrorist attacks on September 11, 2001. In reaction to the panic that this event triggered, some business owners feared that having Middle-Eastern employees would scare away customers. Even several years later, Americans seem more hesitant about people they perceive to be “foreigners” or strangers which is contrary to what this country is based on. An unlawful employment decision based on customer preference is seen in the following example:

> Alexi, a Serbian-American college student, applies to work as a cashier at a suburban XYZ Discount store. Although Alexi speaks fluent English, the manager who conducts the routine interview comments about his name and noticeable accent, observing that XYZ's customers prize its "all-American image." Alexi is not hired. XYZ has subjected Alexi to unlawful national origin discrimination if it based the hiring decision on

assumptions that customers would have negative perceptions about Alexi's ethnicity.

Assignment and Promotion

The EEO statutes prohibit limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the individual because of his/her national origin. Thus, for example, an employer may not provide segregated or unequal facilities. It is also unlawful to have separate job classifications based on a protected category such as national origin or to "channel" individuals of a certain national origin into particular jobs or career paths. For example, an employer may not have one job category for employees of Mexican decent and a separate job category for employees of Chinese decent who are performing the same work; nor may an employer channel individuals of a particular national origin into lower-paying jobs. For example:

> XYZ Pizza Palace decides to open a restaurant at a suburban shopping mall. It runs an advertisement in local newspapers recruiting for positions in food preparation, serving, and cleaning. Carlos, a Hispanic man with a few years of experience as a server at other restaurants, applies for a position with XYZ and states a preference for a server position. Believing that Hispanic employees would be better suited for positions with limited public contact at this location, XYZ offers Carlos a position in cleaning or food preparation even though he is as well qualified for a server position as many non-Hispanic servers employed by XYZ. Under the circumstances, XYZ has unlawfully assigned Carlos to a position based on his national origin.

Similarly, employers may not limit promotional opportunities based on national origin. For example:

> Raj, who is Indian, is a computer programmer for XYZ Information Technology Consultants. Raj applies for a slot in XYZ's management development program and is rejected. Raj files an EEOC charge alleging that the rejection was based on his national origin. The employer states that Raj was not selected because he was not as qualified as other applicants. The investigation reveals that, based on XYZ's written criteria, Raj had superior qualifications to three non-Indian candidates selected for the program. The investigation also reveals that since XYZ initiated the management program, only one out of the fifteen candidates selected for the program has been South Asian, even though nearly one-third of the applicants and nearly one-half of the programming staff are South Asian. The evidence establishes that XYZ unlawfully rejected Raj for its management program based on his national origin.

Bona Fide Occupational Qualifications (BFOQs)

Job requirements based on protected characteristics are lawful only when an employer can demonstrate that they are BFOQs reasonably necessary to the normal operation of business. 42 U.S.C. § 2000e-2(e)(1); 29 U.S.C. § 623(f)(1). If a job description includes a requirement based on employee’s national origin all or substantially all of the individuals excluded from the

requirement must be unable to safely and effectively perform the job duties which are reasonably necessary to the safe and efficient operation of the business.

A BFOQ can be a defense for an employer that has engaged in intentional discrimination. The burden is on the employer to prove a BFOQ, and it is a difficult burden. Title VII states that discrimination is OK "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." For example: a French restaurant that hires only French chefs. (It won't work when hiring janitors because it's not "reasonably necessary" to the authenticity of the restaurant.)

Mixed-Motives Cases

Employment decisions that are motivated by *both* national origin discrimination and legitimate business reasons violate Title VII. However, remedies in such "mixed-motives" cases are limited if the employer would have taken the same action even if it had not relied on national origin. The charging party may receive injunctive relief and attorney's fees but is not entitled to reinstatement, back pay, or compensatory or punitive damages.

> Jane, a Chinese-American, was hired to fill a temporary position as an assistant professor of philosophy at a major private university. Several years later, she was rejected for a permanent position in the Philosophy Department. A colleague tells Jane that at the board meeting at which the permanent position and the relative qualifications of the candidates were discussed, the Department Chair, one of the five people on the hiring committee for the position, stated, "I don't care how brilliant she is - one Asian in the Department is enough." Jane files an EEOC charge alleging national origin discrimination based on this evidence.
>
> The EEOC investigation reveals that the Department Chair did, in fact, make the reported statement and that the other hiring committee members generally defer to his hiring recommendations. The investigation also reveals that Jane was less qualified than the selectee. The selectee had numerous well-received publications and lectures recently, but Jane had only published one academic article in three years and had not spoken at conferences in her field. Because the evidence establishes that the university would have made the same decision even absent discrimination, Jane is entitled to injunctive relief and attorney's fees, but not instatement, back pay, or compensatory or punitive damages.

Security Requirements

In some circumstances, employers may justify hiring and other selection decisions by relying on security requirements. Title VII permits refusal to hire, refusal to refer, or termination, where an individual does not meet job requirements that are imposed in the interest of national security under any security program in effect pursuant to federal statute or Executive Order. Additionally, the Commission may not review the substance of a security clearance determination or the security requirement, even if it is allegedly based on national origin. Accordingly, EEOC review of employment decisions involving security clearances is very limited. However, the

Commission can review whether procedural requirements in making security clearance determinations were followed without regard to an individual's protected status. For instance, an employer may not deny procedural safeguards when revoking the security clearances of Cuban-American employees that it grants to other employees.

An employer also may adopt other security requirements for its employees or applicants. Such requirements must be adopted for nondiscriminatory reasons and applied in a nondiscriminatory manner. For instance, an employer may require applicants of Middle Eastern descent to undergo only the same background investigation as applicants of other national origin groups. In addition, employers do not violate Title VII by cooperating with requests by law enforcement officers for access to employee personnel files.

Best Practices

Employers can reduce the risk of discriminatory employment decisions by establishing written objective criteria for evaluating candidates for hire or promotion and applying those criteria consistently to all candidates. Likewise, in conducting job interviews, employers can promote nondiscriminatory treatment by asking the same questions of all applicants and inquiring about matters related to the position in question. If an employer has clearly defined criteria for employment decisions, managers can be more confident that they are selecting the most qualified candidates. Appropriate objective criteria for employment decisions will be tied to business needs. Criteria that are not business-related sometimes improperly screen out individuals based on national origin and should be eliminated. For example:

> For many years, XYZ Tool Corporation has had an apprenticeship program that trains participants in the skills needed to become a journeyman machine mechanic. XYZ started as a family-owned business and has limited the program to individuals who are sponsored by current machine mechanics. In the course of negotiating a new collective bargaining agreement with the local union, XYZ and the union note that the number of applicants to the program has declined steadily for the last ten years and that, while there has been an increase in Filipino and Hispanic workers in the local labor force, there are none in the apprenticeship program. XYZ and the union agree to discontinue the personal sponsorship requirement because it screens out people on the basis of national origin and it is not related to the requirements of the mechanic position.

Discipline, Demotion and Discharge

Workplace policies need to be created and enforced equally among employees without consideration of a person’s national origin. For example:

> XYZ Foods, a grocery store, has a written policy of docking workers' pay for being late. Stephanie, a Somali employee, was docked pay as a penalty for being 15 minutes late on two occasions. While other Somali workers have also been docked pay for being late, Hmong workers have been given warnings or permitted to make up the time for comparable violations. Because XYZ treats Somali employees who violate its tardiness policy more severely than Hmong

> employees who violate it, the company has discriminated against Stephanie based on her national origin.

Likewise, when faced with the need to reduce the head count or implement a mass layoff, an employer must make sure that the cuts are enforced in an evenhanded manner, without regard to national origin. They should confirm that they can articulate a non-discriminatory business reason for the reductions and document that reason. Next they need to devise an objective selection procedure to identify the employees that will be terminated. Two key elements to consider are seniority and merit.

Seniority is straight forward and easily implemented. It also provides a degree of protection by most anti-discrimination statutes which allow an employer to observe the terms of a bona fide seniority system even if its application produces discriminatory results against persons in a protected class.

A selection process based on merit may not be as easily implemented as seniority and since it requires employer discretion, it subjects the employer to discrimination claims. However, this system of selection will allow the employer to keep its most qualified workers. To protect against such claims, employers should use objective performance criteria, judge each employee against those criteria, and be able to explain and justify each termination of a protected class member.

Once a list of employees to be terminated has been established, an employer should analyze the list to determine if any protected classes will be adversely impacted. If so, they may need to revise their list or be prepared to show that their selection process was objective and based on documented nondiscriminatory factors.

Employer decisions to discharge or "lay off" employees must be based on nondiscriminatory reasons, such as seniority, or quality or quantity of work, rather than national origin, religion, or other prohibited factors. Sometimes multiple factors need to be considered. In a case where an employer uses merit to determine lay off status, there may be employees who are similarly situated. Therefore, the employer should use a secondary determining factor such as seniority. Consider the following example:

> Bob, who is Jamaican, was laid off from his position as an accountant with XYZ Medical Supply Co. Bob asks the employer why he was laid off while others were retained and is told that his performance was inferior to that of other accountants. Bob suspects that the employer's reason is a pretext for national origin discrimination and files an EEOC charge. The investigation reveals that XYZ generally relies on seniority in making layoff decisions among employees with satisfactory performance and only relies on other factors, like comparative performance, when employees have comparable levels of seniority. Bob had three years more seniority than Phil and Susan, two non-Jamaican accountants who were not laid off. Bob, Phil, and Susan all received performance evaluations from the same supervisor commending them for "excellent" performance, and all received year-end bonuses.
>
> Under the circumstances, the evidence establishes that XYZ has provided a false reason - performance - for laying off Bob. Bob had the same "excellent" performance as two other accountants, and XYZ failed

to follow its normal layoff policy. Therefore, the evidence establishes that Bob was laid off because of his national origin in violation of Title VII.

Best Practices

Employers can best treat employees of different national origin groups in a nondiscriminatory manner by developing and applying clear objective criteria for discipline, demotion, and discharge decisions. These policies should address issues related to employee misconduct and unsatisfactory work performance. One common approach for addressing misconduct is a progressive discipline policy directed at correcting employee misconduct.

Employers also will benefit from carefully recording the business reasons for disciplinary or performance-related actions and sharing these reasons with the affected employees. In appropriate circumstances, employers also may choose alternative approaches, such as an employee assistance program. Because any policy related to discipline or poor work performance will require some exercise of managerial discretion, employers also may wish to monitor the actions of inexperienced managers and encourage them to consult with more experienced managers when addressing difficult issues.

Citizenship Requirements

Discrimination based on citizenship violates Title VII's prohibition against national origin discrimination under limited circumstances. While Title VII does not prohibit citizenship discrimination per se, citizenship discrimination does violate Title VII where it has the "purpose or effect" of discriminating on the basis of national origin. For example, a citizenship requirement would be unlawful if it is a "pretext" for national origin discrimination, or if it is part of a wider scheme of national origin discrimination. For example:

> Luis, a Mexican citizen, files a charge with the EEOC alleging that he was not promoted from his unskilled laborer position to a skilled craft position by XYZ Petroleum Company because of his Mexican national origin. The investigation reveals that XYZ has many Mexican-Americans employed in unskilled positions, but has a policy requiring that all of its higher-paid skilled workers be U.S. citizens. In addition, Hispanic applicants for entry-level, unskilled jobs are rejected at a much higher rate than non-Hispanic applicants, even accounting for differences in qualifications and/or experience. Hispanic employees also are generally given less favorable work assignments and paid less than non-Hispanic employees who are performing similar work. Under the circumstances, the evidence establishes that the citizenship requirement is part of a wider scheme of unlawful national origin discrimination and was adopted for unlawful discriminatory reasons.

Federal law requires U.S. citizenship for most federal civil service employment. For such employment, the failure to hire an individual because he or she is not a U.S. citizen does not constitute national origin discrimination in violation of Title VII.

In addition to national origin claims under Title VII, individuals who are not U.S. citizens may have claims under other federal statutes, which are enforced by other agencies:

Immigration Reform and Control Act of 1986 (IRCA): IRCA prohibits employers with four or more employees from discriminating because of citizenship status against U.S. citizens and certain classes of foreign nationals authorized to work in the United States with respect to hiring, referral, or discharge. IRCA also prohibits national origin discrimination by employers with between four and fourteen employees. IRCA's nondiscrimination requirements are enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, at the Department of Justice.

Fair Labor Standards Act (FLSA): The FLSA requires, among other things, that covered workers, including those who are not U.S. citizens, be paid no less than the federally designated minimum wage. The FLSA is enforced by the Employment Standards Administration, Wage and Hour Division of the Department of Labor (DOL).

Special Visa Programs: Employment of foreign nationals under special visa programs, such as H-1B and H-2A visas, also may be subject to certain requirements related to wages, working conditions, or other aspects of employment. The Wage and Hour Division of DOL investigates alleged violations of some visa program requirements, including H-1B and H-2A visa requirements.

Immigration Reform and Control Act of 1986 (IRCA)

The Immigration Reform and Control Act of 1986 (IRCA) was enacted to control unauthorized immigration to the United States. Under IRCA, employers may be sanctioned by the Immigration and Naturalization Service (INS) for knowingly hiring non-U.S. citizens who are not authorized to work in the United States. To address the fear that employers would overreact to the threat of sanctions and discriminate against individuals who sounded or appeared "foreign," Congress also passed IRCA's anti-discrimination provisions. IRCA is especially relevant to national origin and citizenship discrimination claims in that it covers employers with 4-14 employees while Title VII covers employers with 15 or more employees.

Under IRCA, employers with four or more employees are prohibited from discriminating on the basis of citizenship status, which occurs when adverse employment decisions are made based upon an individual's real or perceived citizenship or immigration status. Examples of citizenship status discrimination include employers who hire only U.S. citizens or U.S. citizens and green card holders, employers who refuse to hire asylees or refugees because their employment authorization documents contain expiration dates, and employers who prefer to employ unauthorized workers or temporary visa holders rather than U.S. citizens and other workers with employment authorization.

Covered employers are also prohibited from committing document abuse. Document abuse occurs when an employer requests an employee or applicant to produce a specific document, or more or different documents than are required, to establish employment eligibility or rejects valid documents that reasonably appear genuine on their face. Employers must accept any of the documents or combination of documents listed on the back of the INS Form I-9 to establish identity and employment eligibility. Examples of document abuse include requiring immigrants to present a specific document, such as a "green card" or any INS-ISSUED document, upon hire to establish employment eligibility, and refusing to accept tendered documents that appear reasonable on their face and that relate to the individual. U.S. citizens and all immigrants with employment authorization are protected from document abuse.

The anti-discrimination provisions also prohibit small employers (e.g., those with four to fourteen employees) from committing national origin discrimination against any U.S. citizen or individual with employment authorization. Larger employers are already covered by Title VII, which is enforced by the EEOC. In addition, employers may not retaliate against workers who file a complaint, cooperate in an investigation or testify at a hearing.

Requirements

IRCA requires all employers to complete and retain an I-9 form for each new hire. Employees are required to complete the first section of the form and provide a document or documents that establish identity and employment eligibility. Acceptable documents are listed on the back of the I-9 form.

Employers are required to complete the second section of the I-9 form and must accept the proffered documents if they "reasonably appear to be genuine on their face" and relate to the individual. Remember, it is unlawful for an employer to practice "document abuse" by requiring prospective employees to present specific employment documents.

For purposes of completing tax documentation, employers may ask new employees for their social security cards. To avoid allegations of document abuse, the employer should do this separate and apart from the I-9 process.

To avoid potential charges of discrimination, it is recommended that employers not initiate the I-9 process until after the decision to hire has been made and communicated to the employee. Applicants should not be asked where they were born or whether they are legally entitled to work in the United States.

Subsequent to employment, an employer who has reason to believe that a fraudulent document has been presented, perhaps as a result of an INS investigation, should not terminate the employee without first discussing the allegations with him or her. Depending upon the circumstances, the employee can be given an opportunity to provide other documents or additional information for employment verification purposes.

If the I-9 form is a photocopy of an original, be sure to copy both sides of the form to provide to newly hired employees and the separate instruction page. It is good practice to retain copies of employees' eligibility documents. But if this is done, copies should be made of the documents of all employees in order to avoid charges of discrimination.

Enforcement

The Office of Special Counsel for Immigration Related Unfair Employment Practices enforces the statute prohibiting employment discrimination under IRCA, and has the responsibility for handling complaints against all employers alleging citizenship status discrimination, document abuse, retaliation and, if the employer has four to 14 employees, national origin discrimination. The Equal Employment Opportunity Commission handles national origin discrimination complaints against employers with fifteen or more employees.

Penalties

Back pay (for lost wages), instatement or reinstatement, etc., may be awarded to victims of unlawful discrimination.

Penalties for discrimination range between $275 and $2,200 for each victim for the first offense, $2,200 to $5,500 for the second offense, and $3,300 to $11,000 for the third offense. Fines for document abuse range from $110 to $1,100 for each victim.

Best Practices

1. Treat all people the same when announcing a job, taking applications, interviewing, offering a job, verifying eligibility to work, and in hiring and firing.

2. Accept documentation presented by an employee if it establishes identity and employment eligibility; is included in the list of acceptable documents; and reasonably appears to be genuine and to relate to the person.

3. Accept documents that appear to be genuine. You are not expected to be a document expert, and establishing the authenticity of a document is not your responsibility.

4. Avoid "citizen-only" or "permanent resident-only" hiring policies unless required by law, regulation or government contract. In most cases, it is illegal to require job applicants to be U.S. citizens or have a particular immigration status.

5. Give out the same job information over the telephone to all callers, and use the same application form for all applicants.

6. Base all decisions about firing on job performance and/or behavior, not on the appearance, accent, name, or citizenship status of your employees.

7. Complete the I-9 Form and keep it on file for at least 3 years from the date of employment or for 1 year after the employee leaves the job, whichever is later. This means that you must keep I-9s on file for all current employees. You must also make the forms available to government inspectors upon request.

8. On the I-9 Form, verify that you have seen documents establishing identity and work authorization for all employees hired after November 6, 1986, including U.S. citizens.

9. Remember that many work authorization documents (I-9 Form lists A and C) must be renewed. On the expiration date, you must reverify employment authorization and record the new evidence of continued work authorization on the I-9 Form. You must accept any valid document your employee chooses to present, whether or not it is the same document provided initially. Individuals may present an unrestricted Social Security card to establish continuing employment eligibility.

Note:
- Permanent resident cards should not be reverified
- Identity documents should not be reverified

10. Be aware that U.S. citizenship, or nationality, belongs not only to persons born in the United States but also to all individuals born to a U.S. citizen, and those born in Puerto Rico, Guam, the Virgin Islands, the Commonwealth of Northern Mariana Islands, American Samoa, and Swains Island. Citizenship is granted to legal immigrants after they complete the naturalization process.

Coverage of Foreign Nationals

The Commission has taken the position that foreign nationals are covered by the EEO statutes when they apply for U.S.-based employment from outside the United States. If the employment is outside the United States, however, individuals who are not U.S. citizens are *not* protected by the U.S. EEO statutes.

American National Origin

Just as Title VII protects employees of foreign national origin, it also protects those whose national origin is American. In the case of Fortino v. Quasar Co., (950 F.2d 389, 392) the Seventh Circuit Court of Appeals stated:

> "[W]e may assume that just as Title VII protects whites from discrimination in favor of blacks as well as blacks from discrimination in favor of whites, so it protects Americans of non-Japanese origin from discrimination in favor of persons of Japanese origin."

Likewise, in Thomas v. Rohner-Gehrig Co. (582 F. Supp. 669, 675) a federal district court ruled that:

> "Employment discrimination against American citizens based merely on country of birth, whether that birthplace is the United States or elsewhere, contradicts the purpose and intent of Title VII, as well as notions of fairness and equality."

Seeing as America is a country that is made up of immigrants, cases alleging national origin discrimination, whose claimant is American, must first determine which nationality the claimant truly is. Many Americans are still very tied to the country of their ancestors. This fact is best analyzed on a case-by-case basis taking into consideration such factors as a person's physical, linguistic and cultural characteristics of his ancestor's country of origin. For example, a fifth-generation Japanese-American who speaks English fluently and observes American customs may be considered of American national origin whereas a first generation Japanese-American who still relies on the Japanese language and customs may not. For example:

> Technology Company XYZ is owned by a Japanese-born employer. Alan, a second-generation Japanese-American employee, loses a promotion to Eric, a first-generation Japanese American employee and sues claiming that he is the victim of national origin discrimination. He feels that the Eric was favored simply because he is more "Japanese" than Alan. Both men are equally proficient in the English language and both still observe many of the Japanese customs. Alan would likely have a difficult time proving his case. If on the other hand, Alan had been a sixth-generation Japanese-American whose customs followed those of the American culture, then his case would be a lot more persuasive.

Harassment

Harassment Overview

Harassment is one of the most common claims raised in national origin charges filed with the EEOC. During the last decade, the number of private sector national origin harassment charges filed with the EEOC increased from 1,383 charges in fiscal year 1993 to 2,719 charges in fiscal year 2002. In fiscal year 2002, thirty percent of all private sector national origin charges included a harassment claim.

Harassment based on national origin can take many different forms, including ethnic slurs, workplace graffiti, or other offensive conduct directed towards an individual's birthplace, ethnicity, culture, or foreign accent. The conduct need not be explicitly national origin in nature to violate Title VII's prohibition against national origin discrimination, but national origin must be a reason that the work environment is hostile.

National origin harassment violates Title VII when it is so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive. A hostile environment may be created by the actions of supervisors, coworkers, or even non-employees, such as customers or business partners. Relevant factors in evaluating whether national origin harassment rises to the level of creating a hostile work environment may include any of the following:

Whether the conduct was physically threatening or intimidating;

How frequently the conduct was repeated;

Whether the conduct was hostile and/or patently offensive;

The context in which the harassment occurred; and

Whether management responded appropriately when it learned of the harassment.

The following example illustrates the distinction between "merely offensive" and unlawful conduct.

> Muhammad, an Arab-American, works for XYZ Motors, a large automobile dealership. His coworkers regularly call him names like "camel jockey," "the local terrorist," and "the ayatollah," and intentionally embarrass him in front of customers by claiming that he is incompetent. Muhammad reports this conduct to higher management, but XYZ does not respond. The constant ridicule has made it difficult for Muhammad to do his job. The frequent, severe, and offensive conduct linked to Muhammad's national origin has created a hostile work environment in violation of Title VII.

In contrast, the example below illustrates circumstances in which conduct that may be offensive, is not sufficiently severe or pervasive to create a hostile work environment.

> Henry, a Romanian emigrant, was hired by XYZ Shipping as a dockworker. On his first day, Henry dropped a carton, prompting Bill, the foreman, to yell at him. The same day, Henry overheard Bill telling a coworker that foreigners were stealing jobs from Americans. Two months

> later, Bill confronted Henry about an argument with a coworker, called him a "lazy jerk," and mocked his accent. Although Bill's conduct was offensive, it was not sufficiently severe or pervasive for the work environment to be reasonably considered sufficiently hostile or abusive to violate Title VII.

To determine if an action is considered harassment, it must be viewed as such by the people that it affected, not by the ones responsible for it. An employee may not have seen or even meant their words or actions to be harassing in nature, but if the victim felt uncomfortable or insulted, then it would be classified as harassment. If the action is not welcomed by the victim, then an offense has occurred. The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.

Accepting conduct is not the same as welcoming it. A person is not welcoming a conversation or action just because they fail to say anything. They may even participate in the conversation but they feel offended by what someone in the group is saying. Furthermore, just because a person likes something today doesn't mean that they will welcome it tomorrow.

Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

Liability

Employers and employees each play an essential role in preventing national origin harassment. Failure by an employer to take appropriate steps to prevent or correct harassment may contribute to employer liability for unlawful harassment. Likewise, failure by an employee to take reasonable steps to report harassment may preclude the employee from being able to hold an employer responsible for the harassment. When employers and employees both take appropriate steps to prevent and correct national origin harassment, offensive conduct generally will be corrected before escalating to the point of violating Title VII.

Generally, an employer will be liable for unlawful harassment by a supervisor *unless* it can show the following:

> The employer exercised reasonable care to prevent and correct promptly any harassing behavior, *and*
>
> The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

An employer is liable for unlawful national origin harassment by coworkers or non-employees if the employer knew or should have known about the harassment and failed to take immediate and appropriate corrective action.

The most important step for an employer in preventing harassment is clearly communicating to employees that harassment based on national origin will not be tolerated and that employees who violate the prohibition against harassment will be disciplined. In addition, an employer should have effective and clearly communicated policies and procedures for addressing

complaints of national origin harassment (see Sample Policies in Chapter 5 of this guidebook) and should train managers on how to identify and respond effectively to harassment.

Employees who are harassed should take appropriate steps at an early stage to prevent the continuation of the objectionable conduct. In some cases, an employee who is offended by a supervisor's or coworker's conduct may feel he or she can raise it directly with the individual who engaged in the objectionable conduct. In other situations, where the employee believes that the employer's intervention is required to prevent further harassment, the employee should notify the official designated by the employer's complaint or harassment procedures. In some circumstances, it may be reasonable for the employee to notify another appropriate official not specifically designated by the employer to accept complaints, such as where the employer's procedure requires the employee to report the harassment to his or her direct supervisor and that individual is the alleged harasser.

This means that an employer should have an anti-harassment policy and complaint procedure and should be vigilant enough to detect harassing conduct that it reasonably should know about even without a complaint. It should also create an environment in which employees feel free to raise concerns, and are confident that those concerns will be addressed. Victims of harassment, in turn, should make sure management knows about the harassing conduct.

The following examples illustrate how the above practices may affect employer liability.

Employer Not Liable For Unlawful Harassment by a Supervisor

> Carla, a Guatemalan, claims that she was subjected to frequent offensive comments based on sex and national origin by her first-level supervisor. Carla was aware of the employer's anti-harassment complaint procedures, but did not notify her employer or explain her failure to follow those procedures. The employer learned of the harassment from Carla's coworker, and immediately conducted an investigation. The employer reprimanded the supervisor and transferred him to another division. The company is not liable for the harassment because it took reasonable preventive and corrective measures and Carla unreasonably failed to complain about the harassment.

Employer Liable For Unlawful Harassment by a Non-Employee

> Charles is a frequent visitor on XYZ Senior Community's "neighborhood days," when XYZ allows senior citizens in the neighborhood to visit its residents. During his visits, Charles often yells derogatory comments about Asians at Cheryl, a Filipino employee, and has even pushed and tripped her on a few occasions. Cheryl complains about the conduct to a manager, and is told that XYZ cannot take any action against Charles because he is not a resident. On subsequent visits, Charles continues to yell ethnic slurs at Cheryl, and she files an EEOC charge. XYZ is liable for the actions of Charles, a non-employee, because it had the power to control Charles's access to the premises, was aware of Charles's offensive conduct, and did not take corrective action.

The Supreme Court has ruled (*Burlington Industries, Inc. v. Ellerth*, and *Faragher v. City of Boca Raton*) that an employer can be held responsible for harassment committed by a supervisor if the harassment was committed by "a supervisor with immediate (or successively higher) authority over the employee". The standard of liability is based on two principles:

1) An employer is responsible for the acts of its supervisors
2) Employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment

The Supreme Court reasons that vicarious liability for supervisor harassment is appropriate because supervisors are aided in such misconduct by the authority that the employers delegated to them. Therefore, that authority must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment. The determination as to whether a harasser had such authority is based on his or her job function rather than job title (*e.g.*, "team leader") and must be based on the specific facts.

An individual qualifies as an employee's "supervisor" if:

a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or*

b. the individual has authority to direct the employee's daily work activities.

This can include an individual who is temporarily authorized to direct another employee's daily work activities and qualifies as his or her "supervisor" during that time period. Accordingly, the employer would be subject to vicarious liability if that individual commits unlawful harassment of a subordinate while serving as his or her supervisor.

On the other hand, someone who merely relays other officials' instructions regarding work assignments and reports back to those officials does not have true supervisory authority. Furthermore, someone who directs only a limited number of tasks or assignments would not qualify as a "supervisor." For example, an individual whose delegated authority is confined to coordinating a work project of limited scope is not a "supervisor."

In some circumstances, an employer may be subject to vicarious liability for harassment by a supervisor who does not have actual authority over the employee (i.e. if the employee reasonably believed that the harasser had such power). If the chains of command are unclear, then an employee may falsely believe that a person has authority of them when they in fact do not.

Harassment Resulting in a Tangible Employment Action

The Court says that an employer is always liable for a supervisor's harassment if it results in a tangible employment action (an action the significantly changes an employee's status such as hiring, firing, demoting, failure to promote, an undesirable work reassignment, change in benefits, etc.). Unfulfilled threats are insufficient. Characteristics of a tangible employment action are:

1. A tangible employment action is the means by which the supervisor brings the official power of the enterprise to bear on subordinates, as demonstrated by the following:
    - it requires an official act of the enterprise;

- it usually is documented in official company records;
- it may be subject to review by higher level supervisors; and
- it often requires the formal approval of the enterprise and use of its internal processes.

2. A tangible employment action usually inflicts direct economic harm.

3. A tangible employment action, in most instances, can only be caused by a supervisor or other person acting with the authority of the company.

An action can be classified as tangible even if it doesn't result in a change in salary and/or benefits. For example, changing an employee's title to something less prestigious, thereby constituting a demotion or altering their position in such a way that it blocks their opportunity for a promotion or raise, would constitute a tangible employment action.

On the other hand, an employment action is not viewed as tangible if the change to an employee's job is insignificant and does not in any way alter their salary, benefits, duties or prestige but is for some reason unwelcome by the employee.

The result is the same whether the employee rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit. In both those situations the supervisor undertakes a tangible employment action on a discriminatory basis. The Supreme Court stated that there must be a significant change in employment status; it did not require that the change be adverse in order to qualify as tangible.

If a challenged action is deemed as tangible, an employer's only defense would be to show evidence of a nondiscriminatory explanation for the tangible employment action. If so, then a determination must be made whether that explanation is a pretext designed to hide a discriminatory motive.

Harassment Not Resulting in a Tangible Employment Action

If there was not a tangible employment action, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

1. The employer exercised reasonable care to prevent and correct promptly any harassing behavior, and
2. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

If an employer can prove that it fulfilled its duty of reasonable care and that the employee could have avoided all of the harm but unreasonably failed to do so, the employer will avoid all liability for unlawful harassment. However, if an employer cannot prove that it discharged its duty of reasonable care *and* that the employee unreasonably failed to avoid the harm, the employer will be liable. For example, if unlawful harassment by a supervisor occurred and the employer failed to exercise reasonable care to prevent it, the employer will be liable even if the employee unreasonably failed to complain to management or even if the employer took prompt and appropriate corrective action when it gained notice.

In some cases, unlawful harassment will occur and harm will result despite the exercise of requisite legal care by the employer and employee. For example, if an employee reports that their direct supervisor was harassing them, an employer may implement immediate corrective action but what has already occurred caused emotional harm from the beginning. Or, the actions taken by the employer fail to stop the harassment. In these cases, the employer would still be held liable.

The first prong of the affirmative defense requires a showing by the employer that it undertook reasonable care to prevent and promptly correct harassment. Such reasonable care generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment. There is no set means for accomplishing this task. Although a written policy is a good idea, it does not create a “safe harbor” for the employer. For example, if an employer has a written policy in place but fails to conduct a thorough investigation when a claimant makes a complaint, then they have not taken reasonable care to correct the harassment and therefore would have violated their duties.

The second prong of the affirmative defense requires a showing by the employer that the aggrieved employee failed to utilize the company complaint system. An employer who exercised reasonable care is not liable for unlawful harassment if the aggrieved employee could have avoided harm. The burden lies with the employer to prove that the employee's failure to complain was unreasonable.

An employee might reasonably ignore a small number of incidents, hoping that the harassment will stop without resorting to the complaint process. The employee may directly say to the harasser that they want the misconduct to stop and then wait to see if that is effective in ending the harassment before complaining to management. If the harassment persists, however, then further delay in complaining might be found unreasonable.

A complaint by an employee does not automatically defeat the employer's affirmative defense. If, for example, the employee provided no information to support his or her allegation, gave untruthful information, or otherwise failed to cooperate in the investigation, the complaint would not qualify as an effort to avoid harm. Furthermore, if the employee unreasonably delayed complaining, and an earlier complaint could have reduced the harm, then the affirmative defense could operate to reduce damages.

Recommendations for Employers

The best way to avoid a harassment claim is to take as many steps as possible to prevent harassment from occurring in the first place. Employers must adopt a strong anti-harassment policy, periodically train each employee on its contents and procedures, and vigorously follow and enforce it. It is important that employees be able to recognize harassment and understand the consequences of a claim. The following is a list of procedures that an employer may follow to ensure that they are exercising as many preventive measures as possible:

1. Do a visual inspection of your facility and remove any pictures, cartoons or posters that could be considered offensive to employees.

2. Consider how your staff interacts with one another. Does this interaction include:
   - Offensive jokes

- Jokes of ethnic or other discriminatory origin
- Derogatory comments, epithets or slurs
- Physical gestures that are ethnically suggestive in nature

If you witness any of these behaviors, correct them immediately and discuss them at staff meetings using prior incidents as examples.

3. Place educational posters in areas frequented by all employees and applicants.

4. Develop an anti-harassment policy which outlines a clear explanation of the following:
- Prohibited conduct and examples
- Complaint process that provides multiple avenues of complaint
- Assurance that complaints will be protected against retaliation and information will be kept confidential to the extent that it's possible
- Description of a prompt, thorough and impartial investigation which will result in immediate and appropriate corrective action when necessary

5. Distribute your company's policy to all employees, post it in a central location and incorporate it into the employee handbook.

6. Set up a training session that educates both employees and supervisors about harassment. Conduct periodic trainings as reminders and to educate any new hires.

7. Elect a three person Board to serve as a Grievance Committee to investigate any claims of harassment (Small employers may use a two member committee). The Board should include:

A Senior Manager
Personnel Manager
Employee Representative

The Board must include at least one male and one female. Guidelines for investigating a claim should be established and Board members should act independently of each other when handling an investigation.

An act of harassment by itself is against the law. A victim may be entitled to damages even though no employment opportunity has been denied and there is no actual loss of pay or benefits. The Supreme Court's rulings in Ellerth and Faragher create an incentive for employers to implement and enforce strong policies prohibiting harassment as well as implementing effective complaint procedures. Employees must also do their part in alerting management about harassment before it becomes severe. If employers and employees undertake the appropriate steps, unlawful harassment can often be prevented, thereby effectuating an important goal of the anti-discrimination statues.

Language Issues

As the U.S. labor force has grown more ethnically diverse, the number of workers who are not native English speakers has increased dramatically. In the year 2000, approximately 45 million Americans (17.5 percent of the population) spoke a language other than English in the home. Of those individuals, approximately 10.3 million individuals (4.1 percent of the total population) spoke little or no English, an increase from 6.7 million in the year 1990.

The reality of the situation is that the American workforce will no longer be dominated by the American, white male. Not only will employees be more diverse but so will customers, vendors and business associates. Going forward, the success of a business will require employees to assimilate and re-learn communication skills. That includes dealing with accents, communication between employees in a language other than English and communicating with employees who are not as fluent.

Employers sometimes have legitimate business reasons for basing employment decisions on linguistic characteristics. However, linguistic characteristics are closely associated with national origin. Therefore, employers should ensure that the business reason for reliance on a linguistic characteristic justifies any burdens placed on individuals because of their national origin. The subsections below provide guidance on employment decisions that are based on foreign accent or fluency, and guidance on policies requiring employees to speak only English while in the workplace.

Accent Discrimination

In any country, and especially here in the U.S. there are people speaking with a variety of accents. In some cases this is the result of English not being a person's first or only language. But there are even different accents within the English language. Consider the difference between a Boston native and someone with a Southern Drawl. Although they are both speaking the same language, they may have difficulty picking up certain words or phases that are indigenous to the area they originate. People who learn English as their second (or even third) language often have an accent that is even more pronounced. This is because in speaking a "foreign" language, the speaker will carry over the same tones, intonations and rhythm of their native language thereby creating an accent.

Some Americans have the attitude, "They are in America, they should learn English" but accents are not a result of not knowing the language. In many cases, the non-native speakers score higher on English grammar tests than the native speaker. So learning English isn't really the issue, speaking it is. Daniel P. Dato, Ph.D refers to the fact that there are many factors that play into a person's accent. Most notably, there are physical factors. A person uses an estimated 100 different muscles in the throat, larynx, lips, tongue, mouth and breathing mechanisms to create a single sound. Much of this movement is involuntarily and is very difficult to consciously control.

Because linguistic characteristics are a component of national origin, employers should carefully scrutinize employment decisions that are based on accent to ensure that they do not violate Title VII.

An employment decision based on foreign accent does not violate Title VII if an individual's accent materially interferes with the ability to perform job duties. This assessment depends upon the specific duties of the position in question and the extent to which the individual's

accent affects his or her ability to perform job duties. Employers should distinguish between a merely discernible foreign accent and one that interferes with communication skills necessary to perform job duties. Generally, an employer may only base an employment decision on accent if effective oral communication in English is required to perform job duties and the individual's foreign accent materially interferes with his or her ability to communicate orally in English. Positions for which effective oral communication in English may be required include teaching, customer service, and telemarketing. Even for these positions, an employer must still determine whether the particular individual's accent interferes with the ability to perform job duties. The examples below illustrate how to apply these principles. For example:

Employment Decision Where Accent Is Not a Material Factor

Anna, a Pakistani librarian in an elementary school, is responsible for cataloguing, researching, and reading aloud to young children. Her performance evaluations reflect that she is an excellent cataloguer and researcher and that she can communicate effectively with teachers and older children, but that some of the youngest children have had difficulty understanding her due to her accent. When her position is eliminated, Anna asks the local school board to transfer her to a position at a high school that involves cataloguing and researching but requires minimal student contact. The school board appropriately grants Anna's transfer request because Anna is qualified and her accent would not materially interfere with her ability to perform the librarian position at the high school.

Employment Decision Where Accent Is a Material Factor

A major aspect of Bill's position as a concierge for XYZ Hotel is assisting guests with directions and travel arrangements. Numerous people have complained that they cannot understand Bill because of his heavy Ghanaian accent. Therefore, XYZ notifies Bill that he is being transferred to a clerical position that does not involve extensive spoken communication. The transfer does not violate Title VII because Bill's accent materially interferes with his ability to perform the functions of the concierge position.

Fluency Requirements

Generally, a fluency requirement is permissible only if required for the effective performance of the position for which it is imposed. Because the degree of fluency that may be lawfully required varies from one position to the next, employers should avoid fluency requirements that apply uniformly to a broad range of dissimilar positions.

English Fluency

As with a foreign accent, an individual's lack of proficiency in English may interfere with job performance in some circumstances, but not in others. For example, an individual who is sufficiently proficient in spoken English to qualify as a cashier at a fast food restaurant may lack the written language skills to perform a managerial position at the same restaurant requiring the

completion of copious paperwork in English. As illustrated below, the employer should not require a greater degree of fluency than is necessary for the relevant position.

> Jorge, a Dominican national, applies for a sales position with XYZ Appliances, a small retailer of home appliances in a non-bilingual, English-speaking community. Jorge has very limited skill with spoken English. XYZ notifies him that he is not qualified for a sales position because his ability to effectively assist customers is limited. However, XYZ offers to consider him for a position in the stock room. Under these circumstances, XYZ's decision to exclude Jorge from the sales position does *not* violate Title VII.

Foreign Language Fluency

With American society growing more diverse, employers have increasingly required that some employees be fluent in languages other than English. For example, a business that provides services to Spanish-speaking customers might have a sound business reason for requiring that some of its employees speak Spanish. As with English fluency requirements, requirements for fluency in foreign languages must actually be necessary for the positions for which they are imposed.

A business with a diverse clientele may assign work based on foreign language ability. For example, an employer may assign bilingual Spanish-speaking employees to provide services to customers who speak Spanish, while assigning employees who only speak English to provide services to English-speaking customers. Of course, employers should make such assignments based on language ability. In most cases, employers also may lawfully assign comparable work to employees based on their language skills, and are not required by Title VII to provide additional compensation for work that is performed in a foreign language.

English-Only Rules

According to the U.S. Census Bureau, 47 million people, or one-fifth of the American population, speak a foreign language in the home. The EEOC always has taken the position that linguistic discrimination was a form of national origin discrimination. To drive this point home, in their guidance for national origin discrimination the EEOC included a prominent section on language discrimination including “English-only rules”.

Some employers have instituted workplace policies restricting communication in languages other than English, often called "English-only rules." The EEOC has reported an increasing trend of charge filings alleging English-only violations since the Commission began separately tracking such charges in the mid-1990s. The number of English-only charges filed with EEOC and state and local Fair Employment Practices Agencies increased by nearly 500% from 1996 to 2000.

Application of Title VII to English-Only Rules

Title VII permits employers to adopt English-only rules under certain circumstances. As with any other workplace policy, an English-only rule must be adopted for nondiscriminatory reasons. An English-only rule would be unlawful if it were adopted with the intent to discriminate on the basis

of national origin. Likewise, a policy that prohibits some but not all of the foreign languages spoken in a workplace, such as a no-Navajo rule, would be unlawful. For example:

> XYZ Textile Corp. adopts a policy requiring employees to speak only English while in the workplace, including when speaking to coworkers during breaks or when making personal telephone calls. XYZ places Hispanic workers under close scrutiny to ensure compliance and replaces workers who violate the rule with non-Hispanics. Jose, a native Spanish speaker, files a charge with the EEOC alleging that the policy discriminates against him based on his national origin. XYZ states that the rule was adopted to promote better employee relations and to help improve English skills. However, the investigation reveals no evidence of poor employee relations due to communication in languages other than English. Nor are proficient English skills required for any of the positions held by non-native English speakers. Because XYZ's explanation is contradicted by the evidence, the English-only rule is unlawful.

An English-only rule may be used if it is needed to promote the safe or efficient operation of the employer's business, effectively fulfills the business purpose it is supposed to serve and there is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact. If the employer believes such a rule is necessary, employees must be informed when English is required and the consequences for violating the rule. The employer may provide notice by any reasonable means under the circumstances, such as a meeting, e-mail, or posting. In some cases, it may be necessary for an employer to provide notice in English *and* in the other native languages spoken by its workers. A grace period before the effective date of the rule also may be required to ensure that all workers have received notice.

In evaluating whether to adopt an English-only rule, an employer should weigh business justifications for the rule against possible discriminatory effects of the rule. While there is no precise test for making this evaluation, relevant considerations include:

- Evidence of safety justifications for the rule
- Evidence of other business justifications for the rule, such as supervision or effective communication with customers
- Likely effectiveness of the rule in carrying out objectives
- English proficiency of workers affected by the rule

Even where an English-only rule has been adopted for nondiscriminatory reasons, the employer's use of the rule should relate to specific circumstances in its workplace. An English-only rule is justified by "business necessity" if it is needed for an employer to operate safely or efficiently. The following are some situations in which business necessity would justify an English-only rule:

> For communications with customers, coworkers, or supervisors who only speak English

In emergencies or other situations in which workers must speak a common language to promote safety

For cooperative work assignments in which the English-only rule is needed to promote efficiency

To enable a supervisor who only speaks English to monitor the performance of an employee whose job duties require communication with coworkers or customers

Before adopting an English-only rule, the employer should consider whether there are any alternatives to an English-only rule that would be equally effective in promoting safety or efficiency. Courts would likely uphold a policy that is limited in scope to employees interacting with customers who do not understand the employee's preferred language or where is needed for the sake of safety concerns. Prohibiting employees from speaking other languages during non-working time such as break periods would likely be found unlawful.

The following is an example of a narrowly crafted English-only rule promoting safety in the workplace.

> XYZ Petroleum Corp. operates an oil refinery and has a rule requiring all employees to speak only English during an emergency. The rule also requires that employees speak in English while performing job duties in laboratories and processing areas where there is the danger of fire or explosion. The rule does not apply to casual conversations between employees in the laboratory or processing areas when they are *not* performing a job duty. The English-only rule does not violate Title VII because it is narrowly tailored to safety requirements.

"Employee morale" is not an acceptable reason for implementing an English-only rule. If the speaking of other languages creates tension among the employees, the employer should remind everyone that harassment is not permitted in the workplace and it is never appropriate to exclude someone based on language.

An English-only rule would be unlawful if it were adopted with the intent to discriminate on the basis of national origin. Likewise, a policy that prohibits some but not all of the foreign languages spoken in a workplace, such as a no-Vietnamese rule, would be unlawful.

In 2001, the EEOC announced a landmark $2.44 million settlement of a class action lawsuit against the University of Incarnate Word (UIW), a private university in San Antonio, Texas, on behalf of 18 Hispanic housekeepers who were subjected to an unlawful English-only rule and harassed due to their national origin in violation of Title VII. The settlement is the largest known monetary resolution for a lawsuit concerning an English-only rule in the workplace.

In addition to the monetary payments, the consent decree called for a three-year injunction prohibiting UIW from implementing and enforcing an English-only rule in the workplace and from discriminating on the basis of national origin. UIW also agreed to adopt a comprehensive anti-harassment workplace policy and complaint procedure in English and Spanish. In addition, UIW agreed to train its managers and supervisors regularly on national origin harassment and other unlawful discriminatory practices.

In its suit against UIW, EEOC alleged that a class of 18 Hispanic housekeepers were subjected to an unlawful English-only policy and severe and pervasive harassment for over 10 years on the basis of national origin. UIW's Director of Housekeeping prohibited the housekeepers from speaking Spanish and required that they speak only English in the workplace at all times, even while at lunch and during employee breaks.

According to the suit, some of the UIW employees spoke little or no English, others testified that Spanish was their primary language even though they were born in the United States, while other employees were bilingual. The workers complained that they had difficulty complying with the rule because they did not speak English or unconsciously lapsed into Spanish when conversing with same language peers. Nevertheless, employees who failed to comply with the English-only policy were subjected to repeated verbal and physical abuse, as well as ethnic slurs.

As this case demonstrates, employers need to pay close attention that if they are implementing English-only rules, they need to make sure that they do so only when business necessity dictates it. Not only can it lead to a hostile work environment for the employee, but it can put the employer at risk to costly lawsuits and fines.

State Laws Addressing English-Only Rules

In addition to the Federal Laws, a few states have also implemented statutes addressing English-only rules. For example:

Alaska – Voters passed a law in 1998 that required government employees to speak English-only when conducting public business but it was later ruled unconstitutional by a Superior Court judge.

Illinois – The state civil rights statute prohibits employers from forbidding employees from using a non-English language when speaking about matters that are not work-related.

Nebraska – Passed a law known as Protections for Non-English Speaking Employees which requires employers with 100 or more employees that recruit or hire within 500 miles of the place of employment and where more than 10% of the workforce is non-English speaking and speaks the same non-English language to provide bilingual employee interpreters to assist non-English speaking employees with their job responsibilities and to provide them with information on community services.

California – Employers may only limit or prohibit the use of any language in the workplace under the following conditions:
• the language restriction is justified by a business necessity
• the employer has notified its employees of the circumstances and the time when the language restriction is required to be observed and of the consequences for violating the language restriction.

“Business necessity” is defined as “… an overriding legitimate business purpose such that the language restriction is necessary to the safe and efficient operation of the business, that the language restriction effectively fulfills the business purpose it is supposed to serve, and there is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact.”

In Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, employees can only challenge an English-only policy under federal law if one of the following two circumstances exists:
• the rule is applied to employees who speak no English or who have difficulty speaking English; or
• the policy creates, or is part of, a work environment that is hostile toward national origin minority employees.

If an employee can successfully prove that either of these conditions exists, then the employer must show that the policy is the result of a “business necessity”. Even if the employer is able to show that there is a clear job-related reason for the policy, they may still be in violation if it can be shown that there exists a less discriminatory solution to effectively fulfill the “business necessity”.

There are also a number of states which declare English as the official state language, but these statutes have very little effect on workplace regulations.

Best Practices

In evaluating whether to adopt an English-only rule, an employer should weigh business justifications for the rule against possible discriminatory effects of the rule. While there is no precise test for making this evaluation, relevant considerations include:

Evidence of safety justifications for the rule

Evidence of other business justifications for the rule, such as supervision or effective communication with customers

Likely effectiveness of the rule in carrying out objectives

English proficiency of workers affected by the rule

Before adopting an English-only rule, the employer should consider whether there are any alternatives to an English-only rule that would be equally effective in promoting safety or efficiency. For example:

> At a management meeting of XYZ Electronics Co., a supervisor proposes that the company adopt an English-only rule to decrease tensions among its ethnically diverse workforce. He reports that two of the employees he supervises, Ann and Vinh, made derogatory comments in Vietnamese about their coworkers. Because such examples of misconduct are isolated and thus can be addressed effectively under the company's discipline policy, XYZ decides that the circumstances do not justify adoption of a facility-wide English-only rule. To reduce the likelihood of future incidents, XYZ supervisors are instructed to counsel line employees about appropriate workplace conduct.

An employer should ensure that affected employees are notified about an English-only rule and the consequences for violation. The employer may provide notice by any reasonable means under the circumstances, such as a meeting, e-mail, or posting. In some cases, it may be

necessary for an employer to provide notice in English *and* in the other native languages spoken by its workers. A grace period before the effective date of the rule also may be required to ensure that all workers have received notice.

Sample Policies

Formulating an Effective Policy

It generally is necessary for employers to establish, publicize, and enforce anti-discrimination and anti-harassment policies and complaint procedures. As the Supreme Court stated, "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms" (Ellerth, 118 S. Ct. at 2270). While the Court noted that this "is not necessary in every instance as a matter of law," failure to do so will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment.

An employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically. The policy and complaint procedure should be written in a way that will be understood by all employees in the employer's workforce. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations and incorporating them into employee handbooks. If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities.

An anti-discrimination and anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

A clear explanation of prohibited conduct;

Assurance that employees who make complaints of discrimination/harassment or provide information related to such complaints will be protected against retaliation;

A clearly described complaint process that provides accessible avenues of complaint;

Assurance that the employer will protect the confidentiality of discrimination/harassment complaints to the extent possible;

A complaint process that provides a prompt, thorough, and impartial investigation; and

Assurance that the employer will take immediate and appropriate corrective action when it determines that discrimination/harassment has occurred.

The following pages include examples of EEO policies that companies have implemented.

Example 1

This company is committed to upholding the laws which provide employees Equal Employment Opportunity. As such, the following national origin policy is strictly enforced:

1. No person shall be excluded from consideration for employment because of their national origin. This includes recruitment, hiring practices, placement, promotion, transfer, rate of pay and termination.

2. Any employee who engages in discrimination or harassment based on one's national origin will be subject to suspension or termination.

3. Executive, management and supervisory levels have the responsibility to implement and enforce this policy within the company. Any supervisor or managerial employee who knows that discriminatory or harassing behavior is taking place and fails to take immediate and appropriate corrective action will also be subject to disciplinary action.

4. Any individual who feels they have been harassed or discriminated against based on their national origin should report the matter to their superior or a member of management. If the option appears futile, unsatisfactory or counterproductive, then the employee should contact Human Resources.

5. A claim of discrimination or harassment will be promptly investigated and the appropriate action will be administered. Retaliation against claimants will not be tolerated. The company will protect the confidentiality of discrimination/harassment complaints to the extent possible.

Example 2

Approved by:
Effective date:
Date of last revision:

This company is committed to ensuring equal employment opportunity (EEO) and promoting workforce diversity to maintain a strong, effective, high-performing public service organization. We support and vigorously enforce all applicable Federal EEO laws, regulations, Executive Orders, and management directives to ensure that all individuals are afforded an equal opportunity for success. The relevant laws include Title VII of the Civil Rights Act of 1964, The Immigration Reform and Control Act of 1986 (IRCA), and EEOC Guidelines on Discrimination of National Origin 29 C.F.R. Part 1606. This company will not tolerate discrimination or harassment on the basis of national origin or retaliation for opposing discriminatory practices or participating in discrimination complaint proceedings. This applies to all personnel practices and terms and conditions of employment, including recruitment, hiring, promotions, transfers, reassignments, training, career development, benefits, and separation.

To enforce this policy, this company is empowered to administer an impartial and effective complaint management process to address and resolve complaints of discrimination at the earliest possible stage. Employees may report allegations of discrimination to their immediate supervisor, another management official, their collective bargaining unit or Human Resources, as appropriate. Please note that employees must report such allegations within 45 calendar days of the date of the alleged incident in order for a complaint to be investigated. Allegations of discrimination and harassment will be immediately addressed and appropriate corrective action, up to and including termination, will be taken if allegations are substantiated.

This company is firmly committed to ensuring that all its employees, applicants, contract employees, clients, customers, and anyone doing business with this company is not subjected to discrimination. Harassment is a form of prohibited discrimination and will not be tolerated. The following defines what constitutes harassment:

Harassment is any unwelcome, hostile, or offensive conduct taken on the basis of national origin that interferes with an individual's performance or creates an intimidating, hostile or offensive environment.

Retaliation against individuals for opposition to discrimination or participation in the discrimination complaint process is unlawful and will not be tolerated. This company supports the rights of all employees to engage in protected activity under civil rights statutes, Executive Orders, and whistleblower protection laws. We will work aggressively to protect employees from reprisal for participation in such protected activity. Information and training is available to all employees.

Both supervisors and employees bear responsibility to maintain a work environment free from discrimination and harassment. Employees must not engage in harassing conduct and should report such conduct to their supervisor, another management official, their collective bargaining unit, and/or Human Resources, as appropriate. If an employee brings an issue of harassment to a supervisor's attention, the supervisor must promptly investigate the matter and take appropriate and effective corrective action. Supervisors are encouraged to seek guidance from Human Resources when addressing issues of discrimination or harassment. Both employees

and supervisors are encouraged to resolve such issues at the earliest stage and participate in the alternative dispute resolution. It is every supervisor's responsibility to inform his/her staff of this policy and to ensure that discrimination and workplace harassment of any type will not be tolerated.

Each of us bears the responsibility to ensure that discrimination in the workplace is not tolerated and that diversity is valued. Supervisors and managers serve as agents of this company and bear a special responsibility to ensure that the work environment is free from discrimination and harassment. Promoting the complementary principles of equity and diversity in the workplace is a pivotal element in *building a strong company*. We remain committed to these principles as it pursues its critical mission of *protecting and promoting America's health.*

Example 3 (EEO policy which includes National Origin discrimination)

Discrimination is Unlawful

This company is an equal opportunity employer and we do not engage in practices that discriminate against any person employed or seeking employment based on race, color, gender, religion, sex, national origin, age, marital status, sexual orientation, disability, veterans' status, or any other protected status.

Discrimination by executives, supervisors, employees, clients, vendors and/or contractors will not be tolerated. In addition, retaliation against any individual who has complained about unlawful discrimination, or retaliation against individuals for cooperating with an investigation of a complaint of unlawful discrimination, also will not be tolerated. Persons who violate this policy will be subject to disciplinary action up to and including termination of employment, and/or termination of the contractual relationship.

Discrimination Defined

Black's Law Dictionary defines discrimination as the failure to treat all persons equally where no reasonable distinction can be found between those favored and those who are not favored.

In other words, discrimination is the unfair treatment or denial of standard privileges of employment (such as benefits, working hours, pay increases, transfers, or promotions) based on one's race, age, sex, nationality, pregnancy, religion, marital or veteran status, or handicap whether physical or mental.

Race or Color Discrimination - Equal employment opportunity cannot be denied any person because of their racial group or perceived racial group, their race-linked characteristics (e.g., hair texture, color, facial features), or because their marriage to or association with someone of a particular race or color. Employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups is also prohibited.

National Origin Discrimination - It is illegal to discriminate against an individual because of birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group.

A rule requiring that employees speak only English on the job may violate Title VII unless an employer shows that the requirement is necessary for conducting business. If the employer believes such a rule is necessary, employees must be informed when English is required and the consequences for violating the rule.

Sex Discrimination - This includes practices ranging from direct requests for sexual favors to workplace conditions that create a hostile environment for persons of either gender, including same sex harassment.

Pregnancy Based Discrimination - Pregnancy, childbirth, and related medical conditions must be treated in the same way as other temporary illnesses or conditions.

Age Discrimination – Unlawful age discrimination is treating an employee or applicant who is 40 years of age or older differently than a person in a similar position who is substantially younger.

Statements or specifications in job notices or advertisements of age preference and limitations is prohibited. An age limit may only be specified in the rare circumstance where age has been proven to be a *bona fide* occupational qualification.

An employer also cannot deny benefits to older employees. Benefits may be reduced based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

Disability Discrimination – Employers cannot discriminate against an individual who has a physical or mental impairment that substantially limits at least one major life activity, such as walking, seeing, hearing, speaking, learning, or working. It also includes people who have a record of or is believed to have such impairment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question.

Religious Discrimination - Employers may not treat employees or applicants more or less favorably because of their religious beliefs or practices. Employees cannot be forced to participate -- or not participate -- in a religious activity as a condition of employment.

Employers must reasonably accommodate employees' sincerely held religious practices unless doing so would impose an undue hardship on the employer.

Equality is the Law

Title VII of the Civil Rights Act of 1964 protects all employees and applicants from employment discrimination based on **race, color, sex** (gender), **religion** and **national origin**.

The **Americans with Disabilities Act of 1990** (ADA) protects qualified individuals with disabilities from employment discrimination based on **disability**.

The **Age Discrimination in Employment Act** (ADEA) of 1967 protects employees and applicants who are 40 years of age or older from employment discrimination based on **age**.

The **Equal Pay Act** (EPA) of 1963 protects all employees and applicants from employment discrimination in wages based on **sex** (gender).

Discrimination in the Workplace

It is illegal to discriminate in any aspect of employment including:

hiring and firing;
compensation, assignment, or classification of employees;
transfer, promotion, layoff, or recall;
job advertisements;
recruitment;
testing;
use of company facilities;
training and apprenticeship programs;
fringe benefits;
pay, retirement plans, and disability leave; or
other terms and conditions of employment.

Examples of Discrimination

Harassment on the basis of race, color, religion, sex, national origin, disability, or age;

Retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;

Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities;

Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group;

Verbal abuse, offensive innuendos or derogatory words, concerning a person's race, color, gender, age, sexual orientation, religion, ethnic or national origin, disability, veterans' status, or any other protected status;

Intentionally treating employees or applicants differently than others who hold or are applying for similar jobs. Disparate treatment can occur in any area of employment, including hiring, discipline, performance appraisal, termination, working conditions, and benefits. Harassment is a form of disparate treatment; and

Having employer policies or procedures that appear neutral but have a particularly negative effect on a group with a common race, color, sex, national origin, religion, age, or disability status. This effect does not have to be intended.

Filing a Complaint

If you feel that you have been subjected to discrimination or harassment, by any person employed by or doing business with this company, or you have witnessed such activity, please report the incident immediately to your supervisor. If reporting the incident to your supervisor is inappropriate because your complaint involves your supervisor or you fear reprisal, then please report the incident to:

_____

Name, Title and Phone Number

Anyone that receives a complaint of discrimination or harassment must treat the matter seriously and conduct a prompt, impartial and thorough investigation and report it to:

_____

Name, Title and Phone Number

Investigations and resolutions will be handled with as much privacy, discretion and confidentiality as possible without compromising diligence and fairness. Everyone involved in the investigation process shall conduct themselves with professionalism and respect.

If, after investigation, it is found that inappropriate conduct occurred, immediate action will be taken, which may include but is not limited to reprimand, suspension, change in assignments, mandatory training, loss of privileges and/or termination. Retaliation against the person filing the complaint is unlawful and will be subject to disciplinary action which may include termination.

In addition, a complaint of discrimination or harassment may be filed with either the appropriate state or federal agency listed below. Failure to first utilize the internal company complaint process available to you may result in an unfavorable ruling.

U.S. Equal Employment Opportunity Commission
P.O. Box 7033
Lawrence, Kansas 66044
800-669-4000
TTY 800-669-6820
www.eeoc.gov

State Office _____

_____

_____

Phone: _____

Recent Court Cases

Refusing to Hire Non-Hispanics

A nationwide freight management company violated federal law by refusing to hire non-Hispanics, the U.S. Equal Employment Opportunity Commission (EEOC) charged in a lawsuit on 8-12-09. According to the EEOC's lawsuit, from around October 1, 2002, through June 30, 2004, Fort Smith, Ark.-based Propak Logistics, Inc. engaged in unlawful employment practices by refusing to hire an entire class of people for non-management positions at its Shelby, N.C., facility because of their non-Hispanic national origin. The complaint said that the company hired predominantly Latinos to the exclusion of equally or more qualified non-Latinos.

The EEOC filed its lawsuit in U.S. District Court for the Western District of North Carolina, Asheville Division (Civil Action No. 1:09-CV-00311) after first attempting to reach a voluntary settlement. The agency seeks back pay for the discrimination victims, along with compensatory and punitive damages and injunctive relief.

Caribbean Rastafarian Employees Treated Unfairly

Grand Central Partnership, Inc. (GCP) has agreed to settle a religious and national origin discrimination lawsuit brought by the EEOC, the agency announced on 8-7-09. GCP was created by Midtown Manhattan property owners and businesses to revitalize the neighborhood surrounding Grand Central Terminal and it provides privately managed sanitation, maintenance and public safety operations.

The EEOC's lawsuit, Civil No. 08-8023, filed in U.S. District Court for the Southern District of New York, charged that GCP discriminated against four public safety officers based on their religion (Rastafarian) and national origins (Caribbean, including Jamaican, Haitian and Trinidadian). The EEOC said the GCP failed to grant the employees' requests for religious accommodation to the company's grooming policy, which provided that employees must not wear their hair outside their uniform hats. The officers maintain long dreadlocks and short beards in line with their Rastafarian religious faith. Three of the officers faced suspensions for allegedly violating the grooming policy.

The consent decree settling the lawsuit provides for injunctive relief and policy changes including revised equal employment policies and procedures and related training for its managers and line employees. GCP will also pay $40,000 to resolve this matter, which will be distributed among the discrimination victims, and all grooming policy-related disciplinary notices will be removed from the their personnel files.

"We appreciate that following the filing of EEOC's court complaint, GCP voluntarily accommodated these officers by allowing them to wear their dreadlocks in neat ponytails and allowing them to maintain short beards as required by their religious practices, even before the parties reached a formal settlement of this litigation," said Spencer H. Lewis, director of the EEOC's New York District Office.

Sunu P. Chandy, senior trial attorney in the EEOC's New York District Office, added, "Employers are obligated to explore how they may accommodate employees' or applicants' religious beliefs. In addition to time off for religious services, this may also include accommodations such as allowing time and space for prayer during the workday or, as in this case, making adjustments to grooming and uniform policies."

African American Housekeepers Fired and Replaced With Hispanics

A Pinehurst, N.C.-based support services company for condominium complexes and resorts will pay $44,700 and furnish significant remedial relief to settle a race and national origin discrimination lawsuit filed by the EEOC, the agency announced on 8-6-09. The EEOC had charged that Little River Golf, Inc. unlawfully discharged six employees because of their race (African American) and national origin (non-Hispanic).

According to the EEOC, the discriminatory discharges occurred in September 2005, when Little River Golf operated a housekeeping service for condominiums in the Pinehurst area. The EEOC alleges that the company terminated Mary Wharton, Sharon Martin, Linda Bowden, Stefen Smith, Alex Martin and Kenneth Tillman under the guise of a layoff. After they were discharged, they were all immediately replaced by Hispanic workers. Little River no longer operates its housekeeping service.

Race and national origin discrimination violate Title VII of the Civil Rights Act of 1964. The EEOC filed suit after first attempting to reach a voluntary settlement.

In addition to the $44,700 in monetary damages to be shared by the discharged employees, the consent decree resolving the case (*EEOC v. Little River Golf, Inc.,* Case No. 1:08CV00546, filed in the U.S. District Court for the Middle District of North Carolina, Rockingham Division) includes prospective injunctive relief, in the event Little River Golf commences operations in the future. The injunctive relief enjoins the company from discriminating on the basis of race, national origin or any other protected category, or engaging in retaliation within the meaning of Title VII. The decree also requires the adoption of an anti-discrimination policy; anti-discrimination training; the posting of a notice about the settlement; and reports to the EEOC.

“This case represents the unfortunate reality that some employers are willing to discriminate against one racial or cultural group in favor of another,” said Lynette A. Barnes, regional attorney for the EEOC’s Charlotte District office. “Employers must remember that people of all races and colors are entitled to equal treatment in the workplace. The EEOC will continue to prosecute cases like this.”

Egyptian Worker Subjected to Repeated Abuse and Retaliation

The Sahara Hotel and Casino on the Las Vegas Strip violated federal law by creating a hostile work environment for an Egyptian kitchen employee through a daily barrage of derogatory comments due to his national origin and retaliating against him when he reported it, the EEOC charged in a lawsuit filed 7-30-09.

According to the EEOC's complaint, the Sahara's supervisors and coworkers continuously belittled and harassed Ezzat Elias, whose job was delivering food from the kitchen to the hotel buffet and maintaining the buffet, because of his Egyptian heritage. The harassment included offensive comments, slurs, and graffiti, such as being called “Bin Laden,” “Taliban,” and “f ____ Egyptian” and being told to “go back to Egypt.” Elias was also targeted with graffiti, which he was then required to wash off. Despite Elias’s repeated complaints of such harassment, the defendants failed to take effective measures to stop it. Instead, supervisors retaliated against him, which included disciplinary write-ups and suspension.

The EEOC filed the suit in U.S. District Court for the District of Nevada after first attempting to reach a voluntary settlement. The Commission seeks monetary damages for Elias, as well as injunctive relief to prevent such discrimination in the future.

"There is no excuse for such blatant and abusive behavior targeting workers on the basis of their national origin," said EEOC Las Vegas Local Director Lucy Orta. "Employers must train their managers and frontline supervisors to prevent discrimination and to take prompt and effective action against harassment when it occurs."

EEOC Regional Attorney Anna Y. Park commented, "Employers only compound their problems when they fail to take discrimination complaints seriously. This allows harassment to escalate into retaliation. The EEOC takes retaliation very seriously because workers who speak up and speak out against unlawful discrimination should not be forced to endure more problems because they have done the right thing."

Latino Employees Falsely Accused of Attending Immigration Rally

ResCom Services, Inc., a Vista, Calif.-based property service company, will pay $115,000 and furnish other relief to settle a national origin discrimination lawsuit filed by the EEOC, the agency announced on 7-13-09. The EEOC had charged that Latino employees were discriminated against when ResCom disciplined them for being absent from work on May 1, 2006, the day of a "May Day" immigration rally.

The EEOC filed suit after investigating a discrimination charge filed by Latino employee Elvis Lopez, who was suspended from ResCom's San Diego facility after his supervisor assumed he had missed work to attend the immigration rally. In addition to Lopez, the EEOC identified two additional current and former Latino employees who were also disciplined, one even being terminated, for their absence on the day of the rally when ResCom subjected them to false assumptions based on stereotypes shaped by their national origin. ResCom had previously established a policy prohibiting its majority Latino workforce from attending the rally. All three employees had either received pre-approval for their absence or had notified a supervisor in advance of their absences, none of which were related to the rally.

The EEOC filed suit after first attempting to reach a voluntary settlement. In addition to the $115,000 in monetary relief, a three-year consent decree settling the suit will also ensure that (1) employees receive annual training regarding national origin discrimination; (2) ResCom will closely track any future complaints to conform to its obligations under Title VII; and (3) the company will provide annual reports to the EEOC regarding its employment practices.

"The days when employers make decisions based on stereotypes and assumptions shaped by the race and national origin of their employees should be far behind us," said Anna Park, the regional attorney for the EEOC's Los Angeles District Office.

Thomas McCammon, the EEOC's San Diego local director, added, "Managers working with employees from diverse backgrounds are at the forefront of bridging the gaps that divide us. The Commission remains committed to working with employers to succeed in this shared goal."

Hispanics Subjected to Harassment and Repeated Verbal Abuse

Simon Property Group, Inc., a nationwide commercial property management company, violated federal law by subjecting Hispanic employees to national origin discrimination, the EEOC charges in a lawsuit filed 7-2-09. Simon Property Group owns and/or manages various shopping malls throughout the country, including the Forum Shops at Caesars Palace in Las Vegas, where the EEOC said the discriminatory acts took place.

According to the EEOC's lawsuit, a class of Hispanic housekeepers were subjected to a hostile work environment while performing custodial and janitorial duties at the Forum Shops. The harassment began in 2005, when the housekeeping shift lead was hired, and ended when he was terminated for reasons related to the harassment. The housekeeping shift lead referred to housekeepers and other Latino employees as "wetbacks," "tacos," and "burritos" and repeatedly told them to "go back to Mexico" – among other things. He also told the Latinos that Mexicans have "inferior intelligence and capability in comparison to whites, and that is why whites are in power."

The EEOC filed the suit in U.S. District Court for the District of Nevada after first attempting a voluntary settlement. The EEOC seeks lost wages, compensatory and punitive damages, and injunctive relief to prevent and correct any future workplace discrimination.

National Origin and Race Bias Class Suit

Ceisel Masonry will pay half a million dollars to settle a race and national origin discrimination lawsuit brought by the EEOC, the agency announced 5-22-09. The EEOC's suit charged that the north suburban construction company violated federal anti-discrimination laws by subjecting its Hispanic workers to harassment based upon their race and national origin.

The EEOC brought its suit on behalf of a class of 10 Hispanic workers, charging that Ceisel's foremen and former superintendent would refer to the company's Latino employees with derogatory terms such as "f---ing Mexicans," "pork chop," "Julio," "spics," "chico" and "wetback." In addition, the EEOC and the former employees alleged that Hispanic workers were routinely exposed to racist graffiti, which the company never addressed.

"No employee should have to trade his or her dignity for the right to work, and no employer should permit this type of verbal abuse of employees," said EEOC Acting Chairman Stuart J. Ishimaru. "We take allegations of racial or ethnic harassment very seriously and will pursue these cases vigorously."

The EEOC filed suit after an administrative investigation managed by Chicago District Director John Rowe found reasonable cause to believe federal law had been violated, and after first attempting to reach a voluntary settlement. The EEOC suit was filed April 13, 2006, and captioned *EEOC v. Ceisel Masonry,* No. 06 C 2075. The EEOC's suit was joined by a companion suit filed by the Chicago Lawyers' Committee for Civil Rights Under the Law on behalf of three of the discrimination victims, captioned *Ramirez, et al v. Ceisel Masonry,* No. 06 C 2084. Both cases were filed in U.S. District Court for the Northern District of Illinois, Eastern Division, in Chicago.

The consent decree settling the suit, signed by Judge Harry D. Leinenweber, provides that the defendants will pay $500,000 to resolve this matter. The three-year decree enjoins the company

from future discrimination on the basis of race or national origin and from any retaliation. It mandates that the company will provide all of its employees with training on how to prevent discrimination, as well as revise its policies on harassment and how to conduct harassment investigations. The decree also requires the company to hold its supervisors accountable if they do not comply with the company's new anti-harassment and investigation policies.

John Hendrickson, regional attorney for the Chicago District Office, which oversees EEOC litigation in a six-state region, said, "This case is a reminder that the federal laws against discriminatory harassment on the job have broad, general application. They apply not only to race and sexual harassment, but also to harassment on the basis of national origin. Employers must act decisively against harassment, especially when it comes from supervisors or foremen who have great power over workers, or pay the consequences."

Hispanic Workers Subjected to Ethnic Taunts

Sam's Club, the wholesale chain store owned and operated by Wal-Mart, violated federal law by compelling Latino employees to endure a hostile work environment based upon their Mexican national origin, the EEOC charged in a lawsuit it filed 5-7-09.

The EEOC's suit, filed in U.S. District Court for the Eastern District of California, charges a Fresno Sam's Club subjected Latino employees to repeated verbal harassment, including the repeated use of derogatory words such as "wetback."

The EEOC filed suit after first attempting to reach a voluntary settlement. The agency's suit seeks compensatory and punitive damages for each of the claimants as well injunctive relief, including the creation of a formal discrimination complaint procedure, effective investigative and monitoring mechanisms, and annual training on equal employment opportunity for all employees.

"It is appalling that an employer, after becoming aware of the harassment, allowed this type of behavior to continue without taking appropriate and corrective action," said the EEOC's Fresno local director, Melissa Barrios. "The EEOC will continue to expand its presence in the Central Valley to ensure that its employers understand the magnitude of their duty to protect employees from discrimination."

Anna Park, regional attorney of the Los Angeles District Office, added, "Particularly in California, tolerance of openly racist behavior towards Latinos should be a closed page in our history books. Since such a moment has not been reached, the EEOC will pursue all available remedies, including litigation, to ensure that Central Valley employees are protected against this sort of intolerable and unlawful harassment in the workplace."

English-Only Rule on Spanish Speakers While Permitting Other Foreign Languages in Workplace

Skilled Healthcare Group, Inc., Skilled Healthcare, LLC, and other affiliated companies, will pay up to $450,000 and provide significant remedial relief to a class of Hispanic employees at its nursing homes and assisted living facilities who were subject to harassment, different terms and conditions of employment, promotion, compensation, and treatment through the implementation of an English-only rule that was only enforced against Hispanics, the EEOC announced 4-14-09.

The EEOC filed suit in 2005 against the defendant companies alleging national origin discrimination on behalf of Hispanics under Title VII of the Civil Rights Act in the U.S. District Court for the Central District of California, which approved the three-year consent decree settling the matter.

"As our country's workforce becomes increasingly diverse, employers must be vigilant in ensuring that if English-only rules are necessary, they are not discriminatory," said EEOC Acting Chairman Stuart J. Ishimaru. "National origin discrimination is an abomination to our country, which was founded by immigrants and has prospered from welcoming immigrants."

The lawsuit arose from a charge of discrimination by a monolingual janitor, Jose Zazueta, who was fired from defendants' Royal wood Care Center in Torrance, Calif., for violating the company's English-only policy. By contrast, other employees at defendants' facilities who spoke Tagalog were not disciplined or terminated for speaking that language at work.

The EEOC identified a total of 53 current and former Hispanic employees at facilities in California and Texas who were subjected to disparate treatment and harassment based on their national origin and shared Spanish language. The EEOC alleged that some workers were prohibited from speaking Spanish to Spanish-speaking residents of the facility, or disciplined for speaking Spanish in the parking lot while on breaks. Additionally, the EEOC alleged that defendants gave Hispanic employees less desirable work than non-Hispanic counterparts, paid them less, and promoted them less often.

"The EEOC commends Skilled Healthcare for cooperating with us to establish meaningful mechanisms to advance equal employment opportunities for all workers," said EEOC Los Angeles Regional Attorney Anna Park. "In the most diverse state in the nation, employers should not single out certain languages or cultures for harsher treatment."

As part of the monetary relief for class members, the consent decree provides for the employers to offer English language classes to the 53 claimants. The three-year consent decree also requires that employees receive annual training regarding national origin discrimination; that defendants educate facility residents and patients regarding the rights of the employees under Title VII; that defendants designate an EEO monitor so that future discrimination complaints are closely monitored; and that defendants report annually to the EEOC regarding their employment practices.

Hispanics Paid Less Than Non-Hispanics, Denied Promotion and Health Benefits

Judge Harold Baer of the United States District Court for the Southern District of New York gave final approval to a sweeping consent decree between the EEOC and B & H Foto and Electronics Corp. (B & H), the federal agency announced 3-24-09. The decree resolves a national origin discrimination lawsuit filed by the EEOC on behalf of 149 Hispanic warehouse workers at one of the largest retail sellers of photographic, computer and electronic equipment in the New York metropolitan area.

The EEOC's lawsuit, filed under Title VII of the Civil Rights Act of 1964, alleged that B & H paid Hispanics in its warehouses in Manhattan and Brooklyn less than non-Hispanic workers and failed to promote them or provide health benefits because of their national origin. Under the court-approved consent decree, B & H agreed to cooperate with the EEOC in a claims process

to distribute $4.3 million in monetary relief to 149 employees who were paid less, not promoted, or denied benefits because they are Hispanic.

In addition to the multi-million dollar settlement fund, the consent decree contains injunctive relief requiring B & H to equalize the wages of Hispanic employees to their non-Hispanic coworkers, conduct employer training, adopt an anti-discrimination policy, post EEOC notices, report to the EEOC, and to be monitored by the EEOC for the following five years.

“We commend B & H for working cooperatively with us to resolve this matter without protracted litigation,” said EEOC New York Trial Attorney Lou Graziano. “We encourage other employers to follow B & H’s example of resolving discrimination cases expeditiously and in good faith.”

Regulatory Text

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[Title 29, Volume 4]
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TITLE 29--LABOR

CHAPTER XIV--EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1606_GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN--Table of Contents

Authority: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.

Source: 45 FR 85635, Dec. 29, 1980, unless otherwise noted.

Sec. 1606.1 Definition of national origin discrimination.

The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply general title VII principles, such as disparate treatment and adverse impact.

Sec. 1606.2 Scope of title VII protection.

Title VII of the Civil Rights Act of 1964, as amended, protects individuals against employment discrimination on the basis of race, color, religion, sex or national origin. The title VII principles of disparate treatment and adverse impact equally apply to national origin discrimination. These Guidelines apply to all entities covered by title VII (collectively referred to as “employer”).

Sec. 1606.3 The national security exception.

It is not an unlawful employment practice to deny employment opportunities to any individual who does not fulfill the national security requirements stated in section 703(g) of title VII. \1\

\1\ See also, 5 U.S.C. 7532, for the authority of the head of a Federal agency or department to suspend or remove an employee on grounds of national security.

Sec. 1606.4 The bona fide occupational qualification exception.

The exception stated in section 703(e) of title VII, that national origin may be a bona fide occupational qualification, shall be strictly construed.

Sec. 1606.5 Citizenship requirements.

(a) In those circumstances, where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by title VII. \2\

(b) Some State laws prohibit the employment of non-citizens. Where these laws are in conflict with title VII, they are superseded under section 708 of the title.

\2\ See Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 92 (1973). See also, E.O. 11935, 5 CFR 7.4; and 31 U.S.C. 699(b), for citizenship requirements in certain Federal employment.

Sec. 1606.6 Selection procedures.

(a)(1) In investigating an employer's selection procedures (including those identified below) for adverse impact on the basis of national origin, the Commission will apply the Uniform Guidelines on Employee Selection Procedures (UGESP), 29 CFR part 1607. Employers and other users of selection procedures should refer to the UGESP for guidance on matters, such as adverse impact, validation and recordkeeping requirements for national origin groups.

(2) Because height or weight requirements tend to exclude individuals on the basis of national origin, \3\ the user is expected to evaluate these selection procedures for adverse impact, regardless of whether the total selection process has an adverse impact based on national origin. Therefore, height or weight requirements are identified here, as they are in the UGESP, \4\ as exceptions to the “bottom line” concept.

(b) The Commission has found that the use of the following selection procedures may be discriminatory on the basis of national origin. Therefore, it will carefully investigate charges involving these selection procedures for both disparate treatment and adverse impact on the basis of national origin. However, the Commission does not consider these to be exceptions to the “bottom line" concept:

(1) Fluency-in-English requirements, such as denying employment opportunities because of an individual's foreign accent, \5\ or inability to communicate well in English. \6\

(2) Training or education requirements which deny employment opportunities to an individual because of his or her foreign training or education, or which require an individual to be foreign trained or educated.

\3\ See CD 71-1529 (1971), CCH EEOC Decisions]6231, 3 FEP Cases 952; CD 71-1418 (1971), CCH EEOC Decisions]6223, 3 FEP Cases 580; CD 74-25 (1973), CCH EEOC Decisions]6400, 10 FEP Cases 260. Davis v. County of Los Angeles, 566 F. 2d 1334, 1341-42 (9th Cir., 1977) vacated and remanded as moot on other grounds, 440 U.S. 625 (1979). See also, Dothard v. Rawlinson, 433 U.S. 321 (1977).

\4\ See section 4C(2) of the Uniform Guidelines on Employee Selection Procedures, 29 CFR 607.4C(2).

\5\ See CD AL68-1-155E (1969), CCH EEOC Decisions]6008, 1 FEP Cases 921.

\6\ See CD YAU9-048 (1969), CCH EEOC Decisions]6054, 2 FEP Cases 78.

Sec. 1606.7 Speak-English-only rules.

(a) When applied at all times. A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. \7\ Therefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it.

(b) When applied only at certain times. An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

(c) Notice of the rule. It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

\7\ See CD 71-446 (1970), CCH EEOC Decisions] 6173, 2 FEP Cases, 1127; CD 72-0281 (1971), CCH EEOC Decisions] 6293.

Sec. 1606.8 Harassment.

(a) The Commission has consistently held that harassment on the basis of national origin is a violation of title VII. An employer has an affirmative duty to maintain a working environment free of harassment on the basis of national origin. \8\

(b) Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct:

(1) Has the purpose or effect of creating an intimidating, hostile or offensive working environment;

(2) Has the purpose or effect of unreasonably interfering with an individual's work performance; or

(3) Otherwise adversely affects an individual's employment opportunities.

(c) [Reserved]

(d) With respect to conduct between fellow employees, an employer is responsible for acts of harassment in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees with respect to harassment of employees in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

\8\ See CD CL68-12-431 EU (1969), CCH EEOC Decisions] 6085, 2 FEP Cases 295; CD 72-0621 (1971), CCH EEOC Decisions] 6311, 4 FEP Cases 312; CD 72-1561 (1972), CCH EEOC Decisions] 6354, 4 FEP Cases 852; CD 74-05 (1973), CCH EEOC Decisions] 6387, 6 FEP Cases 834; CD 76-41 (1975), CCH EEOC Decisions] 6632. See also, Amendment to Guidelines on Discrimination Because of Sex, Sec. 1604.11(a) n. 1, 45 FR 7476 sy 74677 (November 10, 1980).

Appendix A to Sec. 1606.8--Background Information

The Commission has rescinded Sec. 1606.8(c) of the Guidelines on National Origin Harassment, which set forth the standard of employer liability for harassment by supervisors. That section is no longer valid, in light of the Supreme Court decisions in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998). The Commission has issued a policy document that examines the Faragher and Ellerth decisions and provides detailed guidance on the issue of vicarious liability for harassment by supervisors. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (6/18/99), EEOC Compliance Manual (BNA), N:4075 [Binder 3]; also available through EEOC's web site, at www.eeoc.gov., or by calling the EEOC Publications Distribution Center, at 1-800-669-3362 (voice), 1-800-800-3302 (TTY).

[45 FR 85635, Dec. 29, 1980, as amended at 64 FR 58334, Oct. 29, 1999]

[EDITOR'S NOTE: The following excerpt is Section 102 of the Immigration Reform and Control Act of 1986. The complete text of the Act, which is explained in more detail in Chapter XX of this guidebook, can be found at https://www.oig.lsc.gov/legis/irca86.htm. Section 102 has been included here because of its relation to national origin discrimination in the workplace.]

An Act to amend the Immigration and Nationality Act to revise and reform the immigration laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States

of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCES IN ACT.

(a) SHORT TITLE. -- This Act may be cited as the "Immigration Reform and Control Act of 1986". "8 USC 1101 note"

(b) AMENDMENTS TO IMMIGRATION AND NATIONALITY ACT. -- Except as otherwise specifically provided in this Act, whenever in this Act an amendment or repeal is expressed as an amendment to, or repeal of, a provision, the reference shall be deemed to be made to the Immigration and Nationality Act.

TITLE I -- CONTROL OF ILLEGAL IMMIGRATION

PART A -- EMPLOYMENT

SEC. 102. UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES.

(a) IN GENERAL. -- Chapter 8 of title II is further amended by inserting after section 274A, as inserted by section 101(a), the following new section:

"UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES

"SEC. 274B. "8 USC 1324b" (a) PROHIBITION OF DISCRIMINATION BASED ON NATIONAL ORIGIN OR CITIZENSHIP STATUS. --

"(1) GENERAL RULE. -- It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment --

"(A) because of such individual's national origin, or

"(B) in the case of a citizen or intending citizen (as defined in paragraph (3)), because of such individual's citizenship status.

"(2) EXCEPTIONS. -- Paragraph (1) shall not apply to --

"(A) a person or other entity that employs three or fewer employees,

"(B) a person's or entity's discrimination because of an individual's national origin in the discrimination with respect to that person or entity and that individual is covered under section 703 "42 USC 2000e-2" of the Civil Rights Act of 1964, or

"(C) discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

"(3) DEFINITION OF CITIZEN OR INTENDING CITIZEN. -- As used in paragraph (1), the term "citizen or intending citizen' means an individual who --

"(A) is a citizen or national of the United States, or

"(B) is an alien who --

"(i) is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 245A(a)(1), "8 USC 1255" is admitted as a refugee under section 207, "8 USC 1157" or is granted asylum under section 208, "8 USC 1158" and

"(ii) evidences an intention to become a citizen of the United States through completing a declaration of intention to become a citizen; but does not include (I) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after the date of the enactment of this section and (II) and alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year period.

"(4) ADDITIONAL EXCEPTION PROVIDING RIGHT TO PREFER EQUALLY QUALIFIED CITIZENS. -- Notwithstanding any other provision of this section, it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified.

"(b) CHARGES OF VIOLATIONS. --

"(1) IN GENERAL. -- Except as provided in paragraph (2), any person alleging that the person is adversely affected directly by an unfair immigration- related employment practice (or a person on that person's behalf) or an officer of the Service alleging that an unfair immigration-related employment practice has occurred or is occurring may file a charge respecting such practice or violation with the Special Counsel (appointed under subsection (c)). Charges shall be in writing under oath or affirmation and shall contain such information as the Attorney General requires. The Special Counsel by certified mail shall serve a notice of the charge (including the date, place, and circumstances of the alleged unfair immigration-related employment practice) on the person or entity involved within 10 days.

"(2) NO OVERLAP WITH EEOC COMPLAINTS. -- No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964 "42 USC 2000e" unless the charge is dismissed as being outside the scope of such title. No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this subsection, unless the charge is dismissed under this section as being outside the scope of this section.

"(c) SPECIAL COUNSEL. --

"(1) APPOINTMENT. -- The President shall appoint, by and with the advice and consent of the Senate, a Special Counsel for Immigration-Related Unfair Employment Practices (hereinafter in this section referred to as the 'Special Counsel') within the Department of Justice to serve for a term of four years. In the case of a vacancy in the office of the Special Counsel the President may designate the officer or employee who shall act as Special Counsel during such vacancy.

"(2) DUTIES. -- The Special Counsel shall be responsible for investigation of charges and issuance of complaints under this section and in respect of the prosecution of all such complaints before administrative law judges and the exercise of certain functions under subsection (j)(1).

"(3) COMPENSATION. -- The Special Counsel is entitled to receive compensation at a rate not to exceed the rate now or hereafter provided for grade GS-17 of the General Schedule, under section 5332 of title 5, United States Code.

"(4) REGIONAL OFFICES. -- The Special Counsel, in accordance with regulations of the Attorney General, shall establish such regional offices as may be necessary to carry out his duties.

"(d) INVESTIGATION OF CHARGES. --

"(1) BY SPECIAL COUNSEL. -- The Special Counsel shall investigate each charge received and, within 120 days of the date of the receipt of the charge, determine whether or not there is reasonable cause to believe that the charge is true and whether or not to bring a complaint with respect to the charge before an administrative law judge. The Special Counsel may, on his own initiative, conduct investigations respecting unfair immigration-related employment practices and, based on such an investigation and subject to paragraph (3), file a complaint before such a judge.

"(2) PRIVATE ACTIONS. -- If the Special Counsel, after receiving such a charge respecting an unfair immigration-related employment practice which alleges knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity, has not filed a complaint before an administrative law judge with respect to such charge within such 120-day period, the person making the charge may (subject to paragraph (3)) file a complaint directly before such a judge.

"(3) TIME LIMITATIONS ON COMPLAINTS. -- No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel. This subparagraph shall not prevent the subsequent amending of a charge or complaint under subsection (e)(1).

"(e) HEARINGS. --

"(1) NOTICE. -- Whenever a complaint is made that a person or entity has engaged in or is engaging in any such unfair immigration-related employment practice, an administrative law judge shall have power to issue and cause to be served upon such person or entity a copy of the complaint and a notice of hearing before the judge at a place therein fixed, not less than five days after the serving of the complaint. Any such complaint may be amended by the judge conducting the hearing, upon the motion of the party filing the complaint, in the judge's discretion at any time prior to the issuance of an order based thereon. The person or entity so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint.

"(2) JUDGES HEARING CASES. -- Hearings on complaints under this subsection shall be considered before administrative law judges who are specially designated by the Attorney General as having special training respecting employment discrimination and, to the extent practicable, before such judges who only consider cases under this section.

"(3) COMPLAINANT AS PARTY. -- Any person filing a charge with the Special Counsel respecting an unfair immigration-related employment practice shall be considered a party to any complaint before an administrative law judge respecting such practice and any subsequent appeal respecting that complaint. In the discretion of the judge conducting the hearing, any other person may be allowed to intervene in the said proceeding and to present testimony.

"(f) TESTIMONY AND AUTHORITY OF HEARING OFFICERS. --

"(1) TESTIMONY. -- The testimony taken by the administrative law judge shall be reduced to writing. Thereafter, the judge, in his discretion, upon notice may provide for the taking of further testimony or hear argument.

"(2) AUTHORITY OF ADMINISTRATIVE LAW JUDGES. -- In conducting investigations and hearings under this subsection and in accordance with regulations of the Attorney General, the Special Counsel and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated. The administrative law judges by subpoena may compel the attendance of witnesses and the production of evidence at any designated place or hearing. In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the administrative law judge, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

"(g) DETERMINATIONS. --

"(1) ORDER. -- The administrative law judge shall issue and cause to be served on the parties to the proceeding an order, which shall be final unless appealed as provided under subsection (i).

"(2) ORDERS FINDING VIOLATIONS. --

"(A) IN GENERAL. -- If, upon the preponderance of the evidence, an administrative law judge determines that that any person or entity named in the complaint has engaged in or is engaging in any such unfair immigration- related employment practice, then the judge shall state his findings of fact and shall issue and cause to be served on such person or entity to cease and desist from such unfair immigration-related employment practice.

"(B) CONTENTS OF ORDER. -- Such an order also may require the person or entity --

"(i) to comply with the requirements of section 274A(b) with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years;

"(ii) to retain for the period referred to in clause (i) and only for purposes consistent with section 274(b)(5), "8 USC 1324" the name and address of each individual who applies, in person or in writing, for hiring for an existing position, or for recruiting or referring for a fee, for employment in the United States;

"(iii) to hire individuals directly and adversely affected, with or without back pay; and

"(iv)(I) except as provided in subclause (II), to pay a civil penalty of not more than $1,000 for each individual discriminated against, and

"(II) in the case of a person or entity previously subject to such an order, to pay a civil penalty of not more than $2,000 for each individual discriminated against.

"(C) LIMITATION ON BACK PAY REMEDY. -- In providing a remedy under subparagraph (B)(iii), back pay liability shall not accrue from a date more than two years prior to the date of the filing of a charge with

an administrative law judge. Interim earnings or amounts earnable with reasonable diligence by the individual or individuals discriminated against shall operate to reduce the back pay otherwise allowable under such subparagraph. No order shall require the hiring of an individual as an employee or the payment to an individual of any back pay, if the individual was refused employment for any reason other than discrimination on account of national origin or citizenship status.

"(D) TREATMENT OF DISTINCT ENTITIES. -- In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions of each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision shall be considered a separate person or entity.

"(3) ORDERS NOT FINDING VIOLATIONS. -- If upon the preponderance of the evidence an administrative law judge determines that the person or entity named in the complaint has not engaged or is not engaging in any such unfair immigration-related employment practice, then the judge shall state his findings of fact and shall issue an order dismissing the complaint.

"(h) AWARDING OF ATTORNEYS' FEES. -- In any complaint respecting an unfair immigration-related employment practice, an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

"(i) REVIEW OF FINAL ORDERS. --

"(1) IN GENERAL. -- Not later than 60 days after the entry of such final order, any person aggrieved by such final order may seek a review of such order in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business.

"(2) FURTHER REVIEW. -- Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment shall be final, except that the same shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28, United States Code.

"(j) COURT ENFORCEMENT OF ADMINISTRATIVE ORDERS. --

"(1) IN GENERAL. -- If an order of the agency is not appealed under subsection (i)(1), the Special Counsel (or, if the Special Counsel fails to act, the person filing the charge) may petition the United States district court for the district in which a violation of the order is alleged to have occurred, or in which the respondent resides or transacts business, for the enforcement of the order of the administrative law judge, by filing in such court a written petition praying that such order be enforced.

"(2) COURT ENFORCEMENT ORDER. -- Upon the filing of such petition, the court shall have jurisdiction to make and enter a decree enforcing the order of the administrative law judge. In such a proceeding, the order of the administrative law judge shall not be subject to review.

"(3) ENFORCEMENT DECREE IN ORIGINAL REVIEW. -- If, upon appeal of an order under subsection (i)(1), the United States court of appeals does not reverse such order, such court shall have the jurisdiction to make and enter a decree enforcing the order of the administrative law judge.

"(4) AWARDING OF ATTORNEY'S FEES. -- In any judicial proceeding under subsection (i) or this subsection, the court, in its discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee as part of costs but only if the losing party's argument is without reasonable foundation in law and fact.

"(k) TERMINATION DATES. --

"(1) This section shall not apply to discrimination in hiring, recruiting, referring, or discharging of individuals occurring after the date of any termination of the provisions of section 274A, under subsection (1) of that section.

"(2) The provisions of this section shall terminate 30 calendar days after receipt of the last report required to be transmitted under section 274A(j) if --

"(A) the Comptroller General determines, and so reports in such report that --

"(i) no significant discrimination has resulted, against citizens or nationals of the United States or against any eligible workers seeking employment, from the implementation of section 274A, or

"(ii) such section has created an unreasonable burden on employers hiring such workers; and

"(B) there has been enacted, within such period of 30 calendar days, a joint resolution stating in substance that the Congress approves the findings of the Comptroller General contained in such report.

The provisions of subsections (m) and (n) of section 274A shall apply to any joint resolution under subsection (l) of such section.".

(b) NO EFFECT ON EEOC AUTHORITY. -- Except as may be specifically provided in this section, "8 USC 1324b note" nothing in this section shall be construed to restrict the authority of the Equal Employment Opportunity Commission to investigate allegations, in writing and under oath or affirmation, of unlawful employment practices, as provided in section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5), or any other authority provided therein.

(c) CLERICAL AMENDMENT. -- The table of contents is amended by inserting after the item relating to section 274A (as added by section 101(c)) the following new item:

"Sec. 274B. Unfair immigration-related employment practices."

State Specific Discrimination Laws

States generally have their own specific statutes addressing discrimination. Federal law requires at least 15 employees on staff to file a discrimination claim while individual state law may allow a discrimination claim with fewer employees. The chart on the next page shows the state statute, minimum number of employees needed to file a claim and website for each state.

State Specific Discrimination Laws			
State	**Law**	**# of Emp.**	**Website**
Alabama	Ala. Code §25-1-20	15	eeoc.gov
Alaska	Alaska Stat. §18.80.220 Alaska Stat. §47.30.865	2	gov.state.ak.us/aschr
Arizona	Ariz. Rev. Stat. Ann. §41-1461	1	ag.state.az.us/civil_rights
Arkansas	No State	15	state.ar.us
California	Cal. Gov't. Code §12900	5	dfeh.ca.gov
Colorado	Colo. Rev. Stat. §27-34-401	1	dora.state.co.us/civil_rights
Connecticut	Conn.Gen.Stat. §46a-51	3	state.ct.us/chro
Delaware	Del. Code Ann. tit. 19, §710	4	delawareworks.com
Florida	Fla. Stat. Ann. §760.50	15	fchr.state.fl.us
Georgia	Georgia Fair Emp Practices	15	eeoc.gov
Hawaii	Haw.Rev.Stat.§378-1	1	hawaii.gov/hcrc
Idaho	Idaho Code §67-5909	5	www2.state.id.us
Illinois	775 ILCS 5/1-101	1	state.il.us/dhr
Indiana	Ind. Code Ann. §§22-9-1-2 and §22-9-2	6	state.in.us/icrc
Iowa	Iowa Code Ann §216.1	4	state.ia.us/government
Kansas	Kan. Stat. Ann. §§44-1101	6	khrc.net
Kentucky	Kentucky Rev.Stat §344.040 Kentucky Rev.Stat §207.135 Kentucky Rev.Stat §342.197	8	state.ky.us/agencies2/kchr
Louisiana	La.Rev.Stat.Ann §23:311-352	20	gov.state.la.us
Maine	Me. Rev. Stat. Ann. tit. 5, §§4551-4663	1	state.me.us/mhrc
Maryland	Md. Code Ann. Â§49B	Varies by County	mchr.state.md.us
Massachusetts	Mass.Gen.Laws Ann.ch 151B	6	state.ma.us/mcad
Michigan	Mich.Comp.Laws §37-2202 Mich.Comp.Laws §37.1202	1	michigan.gov/mdcr
Minnesota	Minn.Stat.Ann §363.01	1	humanrights.state.mn.us
Mississippi	No state	15	eeoc.gov
Missouri	Mo.Ann.Stat §213.010	6	dolir.state.mo.us/hr
Montana	Mont.Code Ann §49-2-303	1	erd.dli.state.mt.us

State Specific Discrimination Laws (continued)			
State	**Law**	**# of Emp.**	**Website**
Nebraska	Neb.Rev.Stat.Ann §48-1101	15	nol.org.home/NEOC
Nevada	Nev. Rev. Stat. Ann. §613.330 & 335	15	detr.state.nv.us/nerc
New Hampshire	N.H.Rev.Stat.Ann §354-A	6	webster.state.nh.us/hrc
New Jersey	N.J.Stat.Ann.10:5-12	1	state.nj.us/lps/dcr
New Mexico	N.M. Stat. Ann. §28-1-7	4	dol.state.nm.us/dol_hrd
New York	N.Y.Exec.Law §§292, 296	4	nysdhr.com nyc.gov/html/cchr/home *
North Carolina	N.C.Gen.Stat §143-422.2 N.C.Gen.Stat §95-28.1-28.1A N.C.Gen.Stat §130A-148 N.C.Gen.Stat §168a	15	eeoc.gov
North Dakota	NDCC Chapter 14-02.4	1	state.nd.us/labor
Ohio	Ohio Rev. Code §4112.04 & .14	4	state.oh.us/crc
Oklahoma	25 Okla. Stat. Ann. §§1301, 1302 & 1901	15	hrc.state.ok.us
Oregon	Or.Rev.Stat §659A.030 covers criminal proceedings rights for misleading advertising	1 (6 for disability)	boli.state.or.us
Pennsylvania	Pa.Stat.Ann.tit.43, §§953, 954	4	phrc.state.pa.us
Rhode Island		15	state.ri.gov
South Carolina	S.C. Code §1-13-30 & 80	15	state.sc.us/schac
South Dakota	No state	15	state.sd.us
Tennessee	Tenn.Code Ann. §4-21-401 Tenn.Code Ann. §8-50-103	8	state.tn.us/humanrights
Texas	Texas Lab. Code §§21.051, 21.101	15	twc.state.tx.us
Utah	Utah Code Ann., Title 34A Ch 5	15 for age	laborcommission.utah.gov
Vermont	Vt. Stat. Ann. tit. 21, §§495-495d	1	state.vt.us
Virginia	Va. Code Ann. 2.1-714	6	chr.state.va.us
Washington	Wash. Rev. Code Ann. §49.60.180	8 (1 for wage)	wa.gov/hrc
West Virginia	W. Va. Code §5-11-1	15	state.wv.us/wvhrc
Wisconsin	Wisc. Stat. Ann. §111.321-11.36	1	dwd.state.wi.us/er
Wyoming	Wyo. Stat. §27-9-105	2	wydoe.state.wy.us

*New York City has its own laws