

## EEOC ISSUES NEW ENFORCEMENT GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION

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**Author:** Bobbi K. Dominick

On November 21, 2016, the EEOC issued a new Enforcement Guidance covering national origin discrimination. The last time the EEOC issued something on national origin discrimination was in 2002, and this guidance includes some important issues and significant legal developments that have occurred since then. Employers would be well advised to pay close attention to such guidance, since the EEOC carefully considers not only its own policies but also court decisions in various areas of discrimination law.

### GENERAL GUIDANCE

The EEOC indicates that discrimination occurs when an individual is treated differently because they are from a particular country, or because they have the physical, cultural or linguistic characteristics of a particular national origin group. What this means is that if an employer engages in practices that discriminate against someone because the employer or its supervisors believe or perceive that the individual has a particular disfavored ethnicity or national origin, that can constitute national origin discrimination even if the individual is not of that heritage (i.e., discriminating against someone because they “look” or “sound” like they are Mexican, Iraqi, or Russian). This includes discrimination based on the “perception” of one’s national origin or ethnicity, based on their association with those who are of a particular national origin (i.e., married to someone of a disfavored ethnicity), or their citizenship status. In addition, the Guidance makes it clear that employers cannot rely upon customer preference as a justification for discrimination.

### ACCENT DISCRIMINATION

The EEOC takes issue with an employer who treats individuals differently because of their accent. In order to use something like accent as a reason for employment decisions, the employer must be able to document that the accent “interferes materially with job performance.” The employer must provide evidence that effective spoken communication in English is required in the particular job duties, and the accent materially interferes with the ability to communicate.

### LANGUAGE DISCRIMINATION

The EEOC cautions employers about language policies that might have the effect of discriminating against national origin groups. Language requirements must be required for the effective performance of the position. The level of fluency required must be assessed per job on a case by case basis, since necessity depends upon the job duties. English only rules must be justified as necessary and consistent with business necessity. A rule requiring English to be spoken at all times will be presumed to violate Title VII.

### CITIZENSHIP

While employers are required to assure that individuals are legally authorized to work in the United States, they cannot apply different standards to individuals from particular national origins.

### **JOB SEGREGATION**

Employers are prohibited from segregating certain jobs for workers of a particular national origin. For example, employers cannot establish rules that only Mexican born workers can work in field picking jobs.

### **HUMAN TRAFFICKING**

The EEOC shows a particular concern for the mistreatment of employees who may also be victims of human trafficking, and will easily find a hostile work environment in such situations.

### **INSIGHTS FOR EMPLOYERS FROM THE EEOC**

1. Use a variety of recruiting methods to attract a diverse pool of applicants (word of mouth is disfavored as likely to result in hiring those within specific pools of people)
2. Explicitly identify as an equal opportunity employer
3. Clearly define criteria for employment decisions
4. Develop objective, job-related criteria for identifying unsatisfactory performance that could lead to discipline or discharge
5. Carefully record the business reasons for particular policies that might impact national origin (like language, communication, practices, dress codes, etc.) to assure they are job related and consistent with business necessity
6. Clearly communicate that national origin discrimination will not be tolerated and those who violate this rule will be disciplined
7. Ensure policies are effectively communicated to all employees despite potential language barriers.

Please contact a Gjording Fouser lawyer at 208.336.9777 if you would like any additional information about this topic or any other employment issues facing your company.