



## EEOC Issues New Guidance on National Origin Discrimination

On November 21, 2016, the Equal Employment Opportunity Commission (EEOC) issued [new guidance](#) on national origin discrimination. National origin discrimination is discrimination because an individual is, or the individual's ancestors are, from a certain place or has the physical, cultural, or linguistic characteristics of a particular national origin group, including Native American tribes. A member of one national origin group can discriminate against a member of the same group. While many of the previous rules and regulations remain intact, new protections have been added.

One of the key changes is the addition of *perceived* national origin to the definition. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on the belief that an individual is (or the individual's ancestors are) from one or more particular countries, or belongs to one or more particular national origin groups. The EEOC's example describes discrimination against someone who is perceived to be from the Middle East, regardless of whether he or she is from the Middle East or ethnically Arab. It is also unlawful to discriminate based on association; for example, you cannot discriminate against an employee because the employee is married to, friends with, or has a child with someone of a different national origin or ethnicity.

Language issues are also emphasized in the new guidance. Specifically, business necessity and material impact on job performance are the only legitimate reasons for basing employment decisions on linguistic characteristics, such as accents. Applying uniform fluency requirements to a broad range of jobs or requiring a greater level of fluency than necessary may result in a violation of Title VII. The EEOC's long-standing English-only guidelines, issued in 1980, provide that rules requiring employees to speak English in the workplace at all times are presumed to violate Title VII.

Title VII applies to all employment decisions, including those involving:

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

- Layoff and termination
- Other terms and conditions of employment

The new EEOC guidance reinforces and clarifies standing obligations of employers who may be in violation of Title VII if they implement discriminatory practices based on customer, client, or employee preferences. This includes but is not limited to:

- Segregation of employees by protected class, such as one ethnic group working in back rooms while others are customer-facing.
- Failure by employers to take steps to protect employees who are harassed by customers based on the employees' national origin.
- Failure to take advantage of preventive or corrective opportunities when a supervisor or employees engage in discrimination.

An employer may also be jointly liable with staffing firms that provide workers if the employer knowingly ignores discriminatory practices. Human trafficking that includes employer misconduct has been added to the definition of unlawful harassment.

The guidance includes "promising practices" for employers that are meant to reduce the risk of Title VII violations. This includes:

- Avoiding word-of-mouth recruitment to attract a diverse applicant pool.
- Establishing written criteria for hiring and promotion and applying the standards consistently.
- Offering training in the languages spoken by employees.
- Developing objective, job-related criteria for identifying the unsatisfactory performance or conduct that can result in discipline, demotion, or discharge.
- Clearly communicating to employees through policies and actions that harassment will not be tolerated and that employees who violate the prohibition against harassment will be disciplined.

Employers should keep in mind that national origin discrimination is often intersectional; individuals can be members of two or more protected classes, such as race, national origin, and sex. Intersectionality can add complexity to discrimination claims.

On the heels of an acrimonious election that has frequently placed national origin in the spotlight, employers should revisit workplace practices, including talent acquisition policies, training and development protocols, anti-harassment training, and complaint resolution practices.

Additional resources:

- Department of Labor Questions and Answers: [Enforcement Guidance on National Origin Discrimination](#)
- Small Business Fact Sheet: [National Origin Discrimination](#)

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