



EEOC's New Enforcement Guidance Addresses National Origin Discrimination

In announcing a comprehensive revamp of its 2002 compliance manual section on national origin discrimination, EEOC Chair Jenny Yang declared in a November 2016 press conference that “[t]he EEOC has identified immigrant, migrant, and other vulnerable populations as a national strategic priority.” The EEOC’s agenda should not come as surprise given the heated political discourse during the 2016 presidential campaign about immigrants and foreigners generally, but employers should take note that the EEOC has forecast unequivocally through an official agency policy that it will be vigilant in looking for employers who discriminate based on national origin and religion, or retaliate against those who raise such claims.

While much of the material in the agency’s new Enforcement Guidance on National Origin Discrimination covers familiar ground, there are some new twists in the EEOC’s interpretation of Title VII that warrant highlighting.

The Enforcement Guidance begins by reaffirming that every employee and applicant is protected against national origin discrimination under Title VII, which it defines as: “(a) treating an individual less favorably because he or she is from a certain place or has the physical, cultural, or linguistic characteristics of a particular national origin (ethnic) group; or (b) using an employment policy or practice that disproportionately impacts people on the basis of national origin and is not shown to be job related and consistent

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with business necessity.” The agency then adds that it interprets Title VII to also bar employment discrimination based on *perceived* national origin. In other words, if someone is believed to be Hispanic/Latino, or Middle Eastern, based on their appearance, language, or accent, they are protected under the statute even if that belief is mistaken.

Two other noteworthy provisions are the Agency’s conclusions that Title VII prohibits discrimination against individuals who *associate* with someone of a particular national origin – such as colleague, spouse, child, etc. – and employers engage in national origin discrimination if they make employment decisions based on the discriminatory *preferences* of clients, customers, or employees (e.g., deferring to a customer request to not be serviced by a Muslim employee or an employee’s request to not work with employees of Arabic descent).

The EEOC also devotes much attention in its Enforcement Guidance to the issue of language in the workplace. It acknowledges that employers may have legitimate business reasons for making language-based employment decisions, but warns that “[e]mployers may not base an employment decision on an accent *unless* the ability to communicate in spoken English is required to perform job duties effectively and the individual’s accent *materially interferes* with that job performance.” The Guidance also provides that “[a] language fluency requirement is lawful *if* fluency is required for the *effective* performance of the position which it is imposed.”

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Some other issues of interest in the Enforcement Guidance concern the hire of non-citizens. Specifically, the EEOC notes that while employers must verify the identity and work authorization of newly hired employees through the I-9 process, employers are not allowed to treat individuals differently during the authorization process based on their national origin, retaliate against them for opposing discriminatory practices or participating in a Title VII proceeding, or use the work authorization process for purposes of reprisal. Employers also cannot refuse to hire an applicant because they lack a Social Security number but are otherwise “work authorized,” and newly hired employees should be allowed to work if they have applied for, but not yet received, a Social Security number.

The Enforcement Guidance closes with practical tips (referred to as “promising practices”) designed to help employers pro-actively avoid Title VII violations. The tips address recruitment methods, developing objective job-related criteria that identify unsatisfactory performance and conduct that can result in discipline, and the need to clearly communicate and train employees on an employer’s anti-discrimination and harassment policies.

It remains to be seen whether the EEOC in the Trump Administration will aggressively pursue the policy agenda articulated in its 2016 Enforcement Guidance, and to what degree the percentage of charges asserting national origin discrimination will escalate as a result of this new focus (11% of the private sector charges in FY 2015 alleged such claims). Irrespective of what changes occur at the agency level, however, the impact of this initiative will surely be felt in Title VII litigation as plaintiffs cite this

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Guidance as persuasive authority for the EEOC's more cutting-edge interpretations of Title VII.

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