

EEOC Updates Its National Origin Discrimination Guidance

by Gabrielle Wirth

On November 18, 2016, the Equal Employment Opportunity Commission (“EEOC”) issued Enforcement Guidance on National Origin Discrimination, replacing the 2002 Compliance Manual section on the same topic. The new guidance discusses specific workplace issues that may give rise to national origin discrimination and provides employers with “promising practices” to proactively address the issue. The EEOC also issued a [“Q&A” publication](#) to summarize the new guidance, as well as a [“Small Business Fact Sheet”](#) that covers the major points of the guidance in non-legal language.

As the American workforce becomes increasingly diverse, the new guidance encourages employers to ensure that their workplaces remain free from national origin discrimination. Title VII and other federal laws protect employees from harassment and adverse employment actions that are based on the employee’s actual or perceived place of origin or ethnic group. A place of origin can be a country, former country, or region that is closely associated with a particular national origin group. An ethnic group refers to a group of people that shares a common language, culture, ancestry, race, or other social characteristic.

As with other forms of employment discrimination, an employer may be liable for national origin harassment when that harassment includes a tangible employment action such as discharge or demotion. Harassment based on national origin can take different forms, including ethnic slurs, intimidation, workplace graffiti, or other offensive conduct directed toward an individual because of his or her birthplace, ethnicity, culture, language, dress, or accent. Employers may be liable for the actions of supervisors, employees, or non-employees, such as clients, customers, or commercial contacts and may reduce or eliminate their potential liability if they take reasonable care to prevent and correct harassing behavior through appropriate discipline and other measures, such as impartial anti-harassment policies.

The new guidance identifies common employment practices that can potentially support a charge of discrimination. For example, recruitment methods, promotion and

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assignment criteria, disciplinary decisions, language prerequisites, or English-only workplace rules can all give rise to Title VII claims unless employers justify these practices with legitimate business reasons. As the EEOC emphasizes, customer or client preference is *not* a legitimate business reason for discriminating against employees of a particular national origin.

Compliance Steps For Employers

The EEOC's guidance provides several "promising practices" that employers can implement to minimize the risk of Title VII violations based on national origin. Some of these practices include:

- **Recruitment.** Rather than relying exclusively on word-of-mouth, employers should use a variety of recruiting methods to attract a diverse pool of applicants. Job announcements should also state that the employer is an "equal opportunity employer."
- **Hiring, Promotion, and Discipline.** Employers should have written, objective criteria for evaluating applicants and employees, and they should clearly communicate these criteria. Employers could also implement progressive discipline policies.
- **Anti-Harassment Policy.** A clear and consistent zero-tolerance policy for harassment is the most important step in preventing hostile work environments. Employers should communicate their policies to all employees and supervisors, implement internally compliant procedures, and train supervisors on how to identify and respond to harassment.
- **Translation of Policies.** As appropriate, employers should provide translated versions of these policies, especially the anti-harassment policies.

The guidance is available here: <https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm>

The EEOC's new guidance and its stated strategy for the next five years are issued almost exactly two months before the scheduled inauguration of President-Elect Donald Trump, who may significantly shake up the agency's agenda. Stay tuned!