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California's New National Origin Discrimination Regulations for Employers

Updated Rules Governing Language Restrictions, Immigration Status Inquiries, Height and Weight Requirements

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California's New National Origin Regulations

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Today's Agenda:

- **National origin discrimination and harassment**
- **What changed on July 1, 2018?**
- **What does "national origin" mean now?**
- **How have language restrictions changed?**
- **How have height and weight requirements changed?**
- **How have immigration-related inquiries changed?**

National origin discrimination in California:

The California Fair Employment and Housing Act prohibits an employer from:

- refusing to hire or employ a person,
- refusing to select a person for a training program leading to employment,
- barring or discharging a person from employment or from a training program leading to employment,
- discriminating against a person in compensation or in terms, conditions, or privileges of employment

because of a person's **national origin**.

National origin harassment in California:

The California Fair Employment and Housing Act prohibits an employer or any other person from harassing an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract because of a person's **national origin**.

Example:

A citizen of Hong Kong worked as an engineer in California. She spoke English as a second language, and she spoke English with an accent. She worked there for 4 years with glowing performance reviews. A new manager started and fired her within 3 months.

Potential national origin discrimination, even before the new regulations?

What changed on July 1, 2018?

- California's Fair Employment and Housing Council amended sections of the California Code of Regulations pertaining to protecting employees from discrimination and harassment based on national origin.

What changed on July 1, 2018?

- 2 CCR §§ 11027.1 and 11028 were amended, in part, to clarify:
  - definition of “national origin”,
  - permissible and prohibited types of:
    - employer policies governing language restrictions in workplace,
    - height and weight requirements for work, and
    - inquiries regarding immigration status.

What does “national origin” mean now?

Without limitation, the individual’s or ancestors’ actual or perceived:

(1) physical, cultural, or linguistic characteristics associated with a **national origin group**;

(2) marriage to or association with persons of a **national origin group**;

(3) tribal affiliation;

(4) membership in or association with an organization identified with or seeking to promote the interests of a **national origin group**;

(5) attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of a **national origin group**; and

(6) name that is associated with a **national origin group**.

What does “national origin” mean now?

“National origin groups” include, but are not limited to, ethnic groups, geographic places of origin, and countries that are not presently in existence.

What does “national origin” mean now?

Epithets, derogatory comments, slurs, or non-verbal conduct based on national origin that may be **harassing** include:

- threats of deportation,
- derogatory comments about immigration status, or
- mockery of an **accent or a language** or its speakers.

What does “national origin” mean now?

FEHC’s example of language or accent:

speaking Irish Gaelic or speaking with a brogue may indicate Irish national origin.

What does “national origin” mean now?

“Employment discrimination based on an applicant’s or employee’s **accent** is unlawful unless the employer proves that the individual’s accent **interferes materially** with the applicant’s or employee’s ability to perform the job in question.”

Interferes Materially

Fragante v. City & Cty. of Honolulu, 888 F.2d 591, 596–97 (9th Cir. 1989)

"Accent and national origin are obviously inextricably intertwined in many cases. It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person's national origin that caused the employment or promotion problem, but the candidate's inability to measure up to the communications skills demanded by the job. We encourage a very searching look by the district courts at such a claim…"

Interferes Materially

Mejia v. New York Sheraton Hotel, 459 F. Supp. 375, 377 (S.D.N.Y. 1978)

Dominican chambermaid properly denied promotion to front desk because of her "inability to articulate clearly or coherently and to make herself adequately understood in ... English."

Carino v. University of Oklahoma Board of Regents, 750 F.2d 815, 819 (10th Cir. 1984)

Plaintiff with a "noticeable" Filipino accent was improperly denied a position as supervisor of a dental laboratory where his accent did not interfere with his ability to perform supervisory tasks.

Interferes Materially

Berke v. Ohio Dept. of Public Welfare, 628 F.2d 980, 981 (6th Cir. 1980)

Employee with "pronounced" Polish accent whose command of English was "well above that of the average adult American" was improperly denied two positions because of her accent.

Xieng v. Peoples Nat'l Bank of Washington, 844 P.2d 389 (1993)

Supreme Court of Washington discussed and applied the Fragante test and rejected the employer's good faith defense due to a complete lack of factual basis. The appellate court had affirmed the trial court's finding that the reason for not promoting the employee was due to his accent (Cambodian) and that such accent did not and would not materially interfere with job performance.

What does “national origin” mean now (CA v. EEOC)?

- Under federal Title VII of the Civil Rights Act of 1964, discrimination and harassment based on national origin are prohibited in employment.

- Does the definition of “national origin” differ between California state law and federal law?

What does “national origin” mean now (CA v. EEOC)?

California	EEOC
[national origin]	an individual’s, or his or her ancestor’s, place of origin;
physical, cultural, or linguistic characteristics associated with a national origin group;	physical, cultural or linguistic characteristics of a national origin group;
marriage to or association with persons of a national origin group;	marriage to or association with persons of a national origin group;
tribal affiliation;	*[No counterpart]*

What does “national origin” mean now (CA v. EEOC)?

California	EEOC
membership in or association with an organization identified with or seeking to promote the interests of a national origin group;	membership in, or association with an organization identified with or seeking to promote the interests of national origin groups;
attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of a national origin group; and	attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and
name that is associated with a national origin group.	Individual’s or spouse’s name is associated with a national origin group.

What does “national origin” mean now (EEOC)?

The federal Equal Employment Opportunity Commission (EEOC) 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**.

What does “national origin” mean now (EEOC)?

- An individual’s **place of origin** may be a country (such as Mexico), a former country (such as Yugoslavia), or a place that is closely associated with an ethnic group but is not a country (such as Kurdistan).

- A national origin group is a **group of people** who share a common language, culture, ancestry, and/or other social characteristics (such as Hispanics/Latinos or Arabs).

What does “national origin” mean now (EEOC)?

Examples:

- Harassment of an employee whose husband is from Afghanistan.
- Failure to hire a Hispanic person because he was perceived to be from Pakistan.
- Failure to hire a man with an accent because he was perceived to be Arab.

How have language restrictions changed?

- History:
  - California state and federal law differ regarding “English-only policies.”
  - Review of these differences helps understand the new changes in California regulations.

How have language restrictions changed?

Federal Title VII provides:

It is unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to **discriminate** against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's national origin.

How have language restrictions changed?

The EEOC issued “Guidelines” that stated that an employee automatically shows a *prima facie* case of discrimination merely by proving the existence of an English-only policy, and unless an employer can show a “business justification,” the employer has violated Title VII.

How have language restrictions changed?

In 1993, the federal Ninth Circuit, which includes California, ***rejected*** those Guidelines, in the case of *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993).

- The employer had an English-only policy that only English could be spoken in connection with work.
- The Ninth Circuit held that the policy would not have any adverse effects on bilingual employees who could speak both Spanish and English.

How have language restrictions changed?

The Ninth Circuit disagreed that English-only policies always infect the working environment to such a degree as to amount to a hostile or abusive working environment for those whose primary language is not English.

How have language restrictions changed?

- The California Legislature reacted.
- Since 2001, California Government Code 12951 has been on the books.
- Aligning with the EEOC, rejecting the Ninth Circuit.

How have language restrictions changed?

- Cal. Govt. Code Section 12951 states that it is an **unlawful employment practice for an employer to adopt or enforce a policy that limits or prohibits the use of any language in any workplace**, unless:

(1) The language restriction is justified by a **business necessity**, which is 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.

(2) 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.

How have language restrictions changed?

According to the new regulations, if an employer has a policy limiting or prohibiting the use of a language, the employer now has to meet a **third requirement** and also show that the restriction is "**narrowly tailored**."

How have language restrictions changed?

A language restriction that “merely promotes business convenience or is due to customer or co-worker preference” will not pass the test.

How have language restrictions changed?

The new regulations also specifically target “English-only rules,” stating that they are **presumptively illegal** unless the employer can meet the three-part test:

- Business necessity
- Notification
- Narrowly tailored

How have language restrictions changed?

- The new regulations also state that "English-only rules are **never** lawful during an employee's non-work time," such as breaks, lunch, and unpaid employer-sponsored events.

- The FEHC further commented in the regulation-making process that an employer's attempt to restrict language use during nonworking hours may involve sufficient employer "control" over that time to make it compensable.

How have language restrictions changed?

Discrimination based on an applicant's or employee's **English proficiency** is also unlawful unless the English proficiency requirement at issue is justified by "**business necessity**" by showing:

- the level of proficiency required is necessary to effectively fulfill the job duties of the position; and
- considering factors such as the type of proficiency required (e.g., spoken, written, aural, and/or reading comprehension), the degree of proficiency required, and the nature and job duties of the position.

How have language restrictions changed?

It is not unlawful for an employer to **request** from an applicant or employee information regarding his or her ability to speak, read, write, or understand any language, including languages other than English, if justified by business necessity.

Issues:

- No published cases have addressed what a “policy” is.
- No published cases have addressed whether there is any difference between a “policy,” a “restriction,” and a “rule.”
- How does an employer make a “policy” and how does the employee know whether a statement about language is a “policy” or not?
- What if one supervisor asks one employee to speak in English?

Example:

Employees complain that their co-workers are making insulting comments (piglet, bad smell, devil) about them in Tagalog using an internal company messaging system.

Supervisor (who does not speak Tagalog) instructs only those employees accused of improper conduct to use English when using the messaging system.

What result under California's regulation prohibiting English-only policies?

How have language restrictions changed?

1. “Employees must speak only in English in the dining room.”
2. “Employees cannot speak in Mandarin in the dining room, but they may speak in Mandarin in the kitchen.”
3. “Employees cannot speak in Spanish on the sales floor.”
4. “Spanish-speaking employees must offer to speak in Spanish with Spanish-speaking customers.”

Recruitment and job segregation

It is an unlawful employment practice for an employer or other covered entity:

- to seek, request, or refer applicants or employees based on national origin; or
- to assign positions, facilities, or geographical areas of employment based on national origin

- **unless pursuant to a permissible defense**.

Recruitment and job segregation

“Permissible defense” may include, for example:

- **Bona Fide Occupational Qualification**. The practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined.
- **Business Necessity**. There exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice that would accomplish the business purpose equally well with a lesser discriminatory impact.
- **Security Regulations**. An employment practice that conforms to applicable security regulations established by the United States or the State of California is lawful.
- **Otherwise Required by Law**. An employment practice is lawful where required by state or federal law or an order of a state or federal court of proper jurisdiction.

Recruitment and job segregation

Example: Can a Korean restaurant hire only people who identify themselves as Korean or Korean-American?

Business necessity

"The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus,

- the business purpose must be sufficiently compelling to override any [discriminatory] impact;
- the challenged practice must effectively carry out the business purpose it is alleged to serve; and
- there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact."

City and County of San Francisco v. Fair Employment and Housing Com. 191 Cal. App. 3d 976, 989–990 (1987) (quoting *Robinson v. Lorillard Corp.* 444 F.2d 791, 798 (4th Cir. 1971)).

Issues

Consider policy reviews and updates:

- Do your EEO policies expressly prohibit associational and perception-based harassment and discrimination based on national origin?
- If an employer has any language restrictions or proficiency requirements, do they meet the requirements in the new regulations?

Issues

Consider training:

- for supervisors and employees on how to communicate effectively with each other and how to courteously and permissibly address language barriers.
- for supervisors and employees on reporting, documenting, and investigating complaints about improper language restrictions.

Immigration

- "All provisions of the [FEHA and the CCR] apply to undocumented applicants and employees to the same extent that they apply to any other applicant or employee. An employee's or applicant's immigration status is irrelevant during the liability phase of any proceeding brought to enforce the [FEHA]." Section 11028(f)(1)
- "Discovery or other inquiry into an applicant's or employee's immigration status shall not be permitted unless the person seeking discovery or making the inquiry has shown by clear and convincing evidence that such inquiry is necessary to comply with federal immigration law." Section 11028(f)(2)
- "It is an unlawful practice for an employer or other covered entity to discriminate against an employee because of the employee's or applicant's immigration status, unless the employer has shown by clear and convincing evidence that it is required to do so in order to comply with federal immigration law." Section 11028(f)(3)

Immigration

Interaction with federal immigration law:

Section 11028(f)(2)

“Discovery or other inquiry into an applicant’s or employee’s immigration status shall not be permitted unless the person seeking discovery or making the inquiry has shown by clear and convincing evidence that such inquiry is necessary to comply with federal immigration law.”

What is “discovery or other inquiry”?

May be a reference to California’s AB 450, the Immigrant Worker Protection Act (codified at Cal. Gov’t Code § 7285.1 – 7285.3 and Cal. Labor Code § §90.2 and 1019.2) (eff. January 1, 2018).

In part, AB 450 provides that employers in California may not consent to an immigration agency’s request to access, review, or obtain employment records, unless presented with a judicial warrant, a subpoena, or a Notice of Inspection (NOI) to review I-9 forms and related documentation.

Also, California employers may not re-verify a current employee’s employment eligibility at a time or in a manner not required by federal immigration law (specifically, 8 U.S.C. § 1324a(b)).

What is “discovery or other inquiry”?

However, the foregoing provisions have been enjoined: *United States v. California*, 2:18-cv-490-JAM-KJN (E.D. Cal. July 5, 2018).

Thus:

The prohibition to providing ICE with employees’ employment or payroll records without a judicial warrant, except for I-9 audits, cannot currently be enforced by California.

For now, does this mean that “clear and convincing” evidence standard under the regulation is not necessary for an inquiry by ICE into an applicant’s or employee’s immigration status?

What is “discovery or other inquiry”?

In addition:

The prohibition against “reverifying” I-9s except as required by federal law cannot currently be enforced by California.

Does this mean that for now, anyway, employers can voluntarily reverify I-9s without running afoul of the new national origin regulations?

Immigration status

Interaction with federal immigration law:

Section 11028(f)(3):

It is an unlawful practice for an employer or other covered entity to discriminate against an employee because of the employee's or applicant's immigration status, unless the employer has shown by clear and convincing evidence that it is required to do so in order to comply with federal immigration law.

What if the employer learns that one of his employees has become unauthorized to work in the United States or if the employer who voluntarily uses E-Verify receive a "Tentative Nonconfirmation"?

Immigration Retaliation

It is unlawful to retaliate against any individual for opposing national origin discrimination or harassment, has filed a complaint, or has participated in a proceeding in which national origin discrimination or harassment. Retaliation may include:

- threatening to contact or contacting immigration authorities or a law enforcement agency about the immigration status of the employee, former employee, applicant, or a family member of the individual; or

- taking adverse action against an employee because the employee updates or attempts to update personal information based on a change of name, social security number, or government-issued employment documents.

Height and Weight

- It is not “new” for height and weight requirements to be considered unlawful because they may discriminate against people in protected classes.

- Some localities in California, such as San Francisco and Santa Cruz, already expressly prohibit employment discrimination based on height and weight.

Height and Weight

- What is new is that California law now expressly states this prohibition.

- The new regulations expressly state that height and weight requirements may be unlawful because they may have the *effect* of discriminating based on national origin.

Height and Weight

Where an employee shows that a height or weight requirement has an **adverse impact**, the requirement is unlawful unless the employer shows it is:

- job related,
- justified by business necessity, and
- its purpose cannot be achieved as effectively through other means.

Height and Weight

Should employers assess existing height and weight requirements to make sure they comply with the regulations?

Do supervisors need training in applying any height and weight requirements?

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