

## Employment Law

*Julie A. Bruch*

*O'Halloran Kosoff Geitner & Cook, LLC, Northbrook*

# The EEOC's Enforcement Guidance on National Origin Discrimination

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In November 2016, the United States Equal Employment Commission (EEOC) issued an enforcement guidance communicating the Commission's position on national origin discrimination under Title VII of the Civil Rights Act of 1964, as amended. *EEOC Enforcement Guidance on National Origin Discrimination*, 2016 WL 7116703 (Nov. 18, 2016), available at <https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm> (EEOC Guidance). The EEOC Guidance presents the EEOC's position and interpretation of the law and explains its analysis in situations where the EEOC's interpretation differs from federal district courts' application of the law. The EEOC defines national origin discrimination as "discrimination because an individual (or his or her ancestors) is from a certain place or has the physical, cultural, or linguistic characteristics of a particular national origin group." EEOC Guidance, *supra*, 2016 WL 7116703, at \*3.

National origin discrimination includes discrimination based on an individual's or his or her ancestor's place of origin which may be a country, a former country, or geographic region. *Id.* This includes employees whose birthplace is the United States who claim that they are being treated less favorably than workers from other locations. Title VII also prohibits discrimination based on an individual's national origin group or ethnic group, which is defined as "a group of people sharing a common language, culture, ancestry, race, and/or other social characteristics" such as Hispanics, Arabs, or Africans. *Id.* Included in this category are individuals who are discriminated against because of their ethnicity or physical, linguistic, or cultural traits closely associated with a national origin group. *Id.* Examples of possible illegal discrimination include taking an adverse action against an employee because of her style of dress or accent. *Id.*

Discrimination also includes treating an individual less favorably due to the perception that he or she belongs to a particular national origin group, even when the perception is incorrect. *Id.* Thus, an employer could violate Title VII for refusing to hire an individual because it believes that he is Polish when he actually is not. Individuals may also be entitled to protection when they are discriminated against because of an association with someone of a particular national origin, such as being married to someone of a different ethnicity. *Id.* at \*4. National origin discrimination may include employment discrimination based on citizenship status if it has the purpose or effect of discriminating based on national origin. *Id.*

The EEOC recommends that employers not rely solely on word-of-mouth recruitment because it may reinforce the existing racial or ethnic makeup of the workplace. *Id.* at \*6. Employers may also not rely on the discriminatory preferences of coworkers, customers, or clients as the basis for adverse employment actions that would discriminate against an individual based on his or her national origin. *Id.* at \*9. Similarly, employers may not assign or refuse to assign individuals to certain positions, facilities, or geographical areas based on their national origin. *Id.* For example, a restaurant could violate Title VII by assigning Hispanic employees solely to cleaning and food preparation positions rather than server jobs based on the belief that customers would prefer servers without accents.

Title VII also prohibits national origin harassment on the same basis as other types of protected classes under Title VII, such as harassment based on sex. While all employers should have policies in place prohibiting sexual harassment, it is important to expand such policies to prohibit harassment based on all of the classes protected under Title VII, including an individual's national origin. The EEOC Guidance makes clear that where harassment does not result in a tangible employment action, the employer may take advantage of the *Ellerth/Faragher* affirmative defense if it exercised reasonable care to prevent and correct promptly any harassing behavior and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.* at \*14; also see *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

The EEOC Guidance also contains a section relating to "language issues." As of 2013, an average of 20.9 percent of the population spoke a language other than English at home. EEOC Guidance, *supra*, 2016 WL 7116703, at \*16. Included in this section is "accent discrimination" where employment decisions or harassment is based on the person's accent. In such cases, courts take a "very searching look" at an employer's reasons for using accent as a basis for an adverse employment decision and require employers to provide evidence to explain such actions. *Id.*

Employers are permitted to base an employment decision on the individual's accent where it "interferes materially with job performance." *Id.* at \*17. This requires evidence that: "(1) effective spoken communication in English is required to perform job duties; and (2) the individual's accent materially interferes with his or her ability to communicate in spoken English." *Id.* The second protected category is English fluency which is permissible only if required for the effective performance of the position for which it is imposed. *Id.* at \*19. The EEOC recommends that employers assess the level of fluency required for a job on a case-by-case basis. *Id.*

Some employers have adopted "English-only rules" requiring employees to speak only English at work. Such a policy violates Title VII if it is adopted for discriminatory reasons such as bias against employees of a particular national origin, but would be permissible if there are substantial business reasons for the policy. *Id.* at \*20. Employers may be required to demonstrate that such policy is job related and consistent with business necessity by showing "detailed, fact-specific, and credible evidence demonstrating that the business purpose of requiring employees to speak a common language is sufficiently necessary to safe and efficient job performance or safe and efficient business operations." *Id.* at \*22. Even in those circumstances, employers should not prohibit employees from speaking their primary language during lunch, breaks, or other personal time while on the employer's premises. *Id.* When such policies are permissible, employers must still provide adequate notice of language-restrictive policies by effectively communicating to employees under what circumstances they will be required to speak a specific or common language and what will happen if they violate the rule. *Id.* at \*24. As with all other protected classes under Title VII, employers may not retaliate against individuals for opposing national origin discrimination or otherwise participating in protected activity. *Id.* at \*26.

The EEOC Guidance includes recommendations from the EEOC on practices employers may consider implementing to minimize the likelihood of Title VII violations based on national origin. The recommendations include using additional recruitment techniques aimed at increasing the overall diversity of the applicant pool rather than relying solely on word-of-mouth recruiting. *Id.* at \*28-29. Employers should consider establishing written objective criteria for evaluating candidates for hiring, promotion, or job assignments. Such criteria should be communicated to prospective candidates and the employers should apply the criteria consistently. *Id.* During interviews, employers should ask candidates the same or similar questions and focus on business needs and matters related to the position in question. *Id.* at \*29. Similarly, employers should implement disciplinary decisions based upon objective, job-related criteria and utilizing a progressive discipline policy directed at correcting employee misconduct. *Id.*



The EEOC recommends that employers record the business reasons for disciplinary performance-related actions and share those reasons with the affected employees. *Id.* at \*30. Lastly, employers should clearly communicate to employees through policies and actions that harassment based on national origin will not be tolerated, employees who violate the policy will be disciplined, and employees who believe they are being harassed should be encouraged to act at an early stage to prevent the continuation of the objectionable conduct. *Id.*

### About the Author

**Julie A. Bruch** is a partner with *O'Halloran Kosoff Geitner & Cook, LLC*. Her practice concentrates on the defense of governmental entities in civil rights and employment discrimination claims.

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