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☐ [Federal Law](#)

Discrimination based on national origin is prohibited by both Title VII of the Civil Rights Act of 1964 and IRCA.

☐ [Title VII of the Federal Civil Rights Act](#)

Title VII of the Civil Rights Act of 1964 prohibits employers of 15 or more employees from discriminating on the basis of national origin. According to the Equal Employment Opportunity Commission's (EEOC) guidelines, unlawful employment action includes discrimination that is based on:

- The employee's particular place of origin or an ancestor's place of origin
- The employer's perception that an individual is a member of a particular national origin group
- Physical, cultural, or linguistic characteristics of a national origin group
- Marriage to or association with persons, membership in organizations, or attendance at schools or churches associated with a national origin group
- A name or spouse's name associated with a national origin group
- Aptitude or other employment tests, unless such requirements are applied equally to all applicants and relate to successful job performance
- An accent or manner of speaking, unless there is a legitimate, nondiscriminatory reason for the action

Bona fide occupational qualification (BFOQ). It is permissible to make employment decisions on the basis of national origin or citizenship because of a BFOQ "reasonably necessary to the normal operation" of a business. Under regulations issued by the EEOC, a BFOQ based on national origin will be interpreted very narrowly. Because BFOQ situations are extremely rare, employers should be very cautious in relying on such a defense when making employment decisions.

The preferences of customers, employers, vendors, or clients cannot serve as the basis for a BFOQ based on national origin or as a defense to discrimination.

[= Retaliation](#)

Title VII also prohibits employers from retaliating against an employee or job applicant who complains of discrimination or who has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII. A recent U.S. Supreme Court ruling has interpreted retaliation to include *any* action by an employer--whether job-related or not--that is "materially adverse" and could dissuade a reasonable employee or job applicant from exercising protected rights (*Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006)). Under the Court's decision, retaliatory actions are not limited to actions that are employment-related (i.e., that affect the terms and conditions of employment or that occur in the workplace), but include any action by an employer that has a materially adverse effect and could reasonably deter a person from engaging in activity protected by Title VII.

In addition, an alleged retaliatory action will be examined in light of the context in which it occurred, so that an action may be retaliatory for an employee in one circumstance, and nonretaliatory for another employee. In an example provided by the Court, a work schedule change might have little adverse effect on many employees, but in the context of an employee with school-age children, the schedule change might have a materially adverse effect and, therefore, be considered retaliatory.

The decision in *White* makes it more important than ever for employers to implement policies that prohibit retaliation and to take steps to ensure enforcement of the policy when employees or applicants complain of discrimination. Training supervisors about actions that may be considered retaliatory and creating a review process for actions taken after an employee has filed a complaint may help employers avoid retaliation claims.

☐ Hiring and Recruitment

Employers that are reviewing or developing hiring practices should consider the following points:

- Relying exclusively on word-of-mouth recruitment through current employees generally replicates the composition of the existing workforce. Unless an employer's workforce is already diverse, a variety of recruitment resources targeted at diverse applicant pools should be used.
- Height or weight requirements that tend to exclude candidates on the basis of national origin should be avoided.
- Be sure a language fluency is necessary to perform the duties of a specific job before requiring it.
- Use several interviewers to minimize the impact of conscious or unconscious discrimination by any single interviewer.
- Ask open-ended questions that relate to the applicant's qualifications and experience.
- Avoid personal questions, particularly those regarding the applicant's marital or family status.
- Avoid training or education requirements that tend to exclude applicants with foreign training or education, or that require foreign training or education.
- Require review of each proposed hire pre-offer, to spot possible discriminatory trends in job and salary offers.

☐ Harassment

Harassment because of national origin, including ethnic slurs and other verbal or physical conduct, is discriminatory if the conduct:

- Creates or is intended to create an intimidating, hostile, offensive working environment;
- Unreasonably interferes with work performance; or
- Otherwise adversely affects an individual's employment opportunities.

Employers may be liable for harassment:

- By their supervisors, whether or not they knew of its occurrence
- By employees and nonemployees if they knew or should have known of the conduct and did not take steps to correct it

Supervisor liability. Under U.S. Supreme Court decisions, employers are responsible for all forms of unlawful harassment by supervisors if the harassment culminates in a tangible employment action (e.g., firing, failure to promote, demotion, and/or reassignment) (*Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)).

If no tangible employment action results, the employer may be able to avoid liability or limit damages by establishing an *affirmative defense*, composed of two necessary elements:

- The employer must show that it exercised reasonable care to prevent and promptly correct any harassing behavior; and
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

To prevent harassment in the workplace, and to support an affirmative defense to a claim of harassment, employers should:

- Establish antiharassment policies and complaint procedures covering *all* forms of unlawful harassment;
- Make sure the policies and procedures are clearly communicated to all employees; and
- Train supervisors in preventing harassment, responding to harassment complaints, and avoiding post-complaint retaliation.

☐ **Establishing Language Requirements**

An employer may require that an employee be able to speak and understand English if the requirement is based on a business necessity. For example, a retail establishment that sells its products to English-speaking customers may require that its salespeople are able to speak and understand English while on the retail floor. However, a policy requiring that only English be spoken at lunch, on breaks, or outside the workplace will be considered unlawful.

The following issues should be addressed where the employer seeks to establish an English-only policy:

Business necessity. Is there a sound business reason for establishing the policy? For example, communication is hampered between the customer and the employee.

Supervisory concerns. Are there complaints that employees are not understanding instructions or communicating about their productivity?

Workplace safety. Are there concerns that safety problems will develop if communication is hampered?

Productivity. Are there concerns that productivity is hampered by ineffective communication?

☐ **Tips When Establishing an English-Only Policy**

When establishing an English-only policy, an employer should be sure the policy is justified by business necessity. Guidelines issued by the EEOC provide examples of a business necessity that would justify an English-only policy:

- For communications with customers, co-workers, or supervisors who speak only English
- In emergencies or other situations in which workers must speak a common language to promote safety
- For cooperative work assignments in which the English-only rule is needed to promote efficiency
- To enable a supervisor who speaks only English to monitor the performance of an employee whose job duties require communication with co-workers or customers

In addition, employers should:

- Meet with employees to explain the policy requirements and the consequences for violating the policy.
- Limit the English-only policy to times when it is justified by a business necessity--i.e., native language communications should not be prohibited during breaks or meal periods.
- Enforce the rule consistently and fairly; e.g., don't allow some employees to speak in their native language and not others.

As a practical matter, an employer should give its employees reasonable advance notice--in English and in their native language--before enforcing a newly established English-only rule. Many employers also allow a grace period before disciplining employees under a new policy. It is often very difficult to change language habits, and therefore, employees may inadvertently violate the rule when it is first enacted.

☐ **IRCA**

IRCA requires *all* employers to complete an I-9 form in order to verify that all prospective employees are legally authorized for employment in the United States (*8 U.S.C. 1101et seq.*). IRCA requires employers to obtain proof of identity and evidence of employment eligibility from employees in the form of legally acceptable documents. These documents are listed on the back of the I-9 form and include a U.S. passport, or a Social Security card along with a driver's license. Please see the [national Aliens/Immigration](#) section.

In addition, IRCA prohibits employers of *four or more employees* from discriminating on the basis of national origin, citizenship, or "intending citizenship." This means that employers must treat all employees the same when completing the I-9 form. Under the IRCA, employers cannot:

- Set different employment eligibility verification standards for different types of employees.
- Request that an employee present more or different documents than are required.
- Refuse to accept documents that appear to be genuine and relate to

the employee presenting them.

- Refuse to hire an individual because a document presented to prove employment eligibility has a future expiration date.

IRCA creates a balancing act for employers that must verify an employee's eligibility to work and also take care not to discriminate against an employee on the basis of national origin.

☐ Undocumented Workers and Federal Laws

National Labor Relations Act (NLRA). Under the NLRA, back pay is a remedy available to workers who are fired for engaging in union activities. However, the U.S. Supreme Court has ruled that federal immigration policies prohibit the National Labor Relations Board (NLRB) from awarding undocumented workers back pay under provisions of the NLRA (*Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 122 S. Ct. 1275 (2002)).

Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The Department of Labor has issued a policy determination stating that it will continue to seek back pay under the FLSA (*29 U.S.C. 201 et seq.*) and the MSPA (*29 U.S.C. 1801 et seq.*) whether or not the worker has the proper documentation to legally work in the United States.

Title VII of the Civil Rights Act of 1964. The EEOC has reaffirmed its position that Title VII makes it unlawful for employers to discriminate against *any* worker in the United States, regardless of immigration status. The EEOC has also directed its field offices to process claims for all forms of relief, other than reinstatement and back pay for periods after discharge or failure to hire, without regard to an individual's immigration status. In other words, employers are still required to make every effort to protect all workers from discrimination based on national origin.

☐ Guidelines for Employers to Prevent Harassment Claims

Know who qualifies as a supervisor. Employers are often exposed to unnecessary liability by failing to be aware of who is representing the company in a supervisory capacity. A supervisor is any individual who is able to:

- Undertake or recommend tangible employment actions; *or*
- Direct an employee's daily work activities.

Use reasonable care. Reasonable care by an employer is found where the employer establishes, disseminates, and enforces an antiharassment policy with:

- A clear explanation of prohibited conduct;
- A clearly described complaint process that provides accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A statement ensuring protection from retaliation for employees who make a complaint of harassment or provide information related to such complaints;
- A complaint process that provides a prompt, thorough, and impartial investigation;
- Assurance that the employer will take immediate and appropriate

Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred;*and*

- Other measures to ensure effective dissemination of the policy and complaint procedure, including posting them in central locations and incorporating them into employee handbooks.

Enact an effective complaint procedure. An employer's harassment complaint procedure should clearly explain the complaint process, provide contact alternatives for employees (e.g. the human resources department, or a company official outside the employee's chain of authority), assure employees that, to the extent possible, complaint information will be kept confidential, and assure employees that the employer will not retaliate against employees who file harassment complaints.

Train employees to use reasonable care. Reasonable care by an employee is found where the employee makes a good-faith attempt to avoid the harm by using the employer's internal complaint procedures in a prompt and reasonable manner. Failure to complain might be considered reasonable if an employee reasonably believes that using the complaint mechanism entails a risk of retaliation. Employers should make their internal complaint procedures easy to use and accessible so that harassment problems can be addressed before they escalate.

☐ **Good Sense Helps Prevent Claims**

Federal law does not prohibit simple teasing, offhand comments, or isolated minor incidents, but in order to prevent claims of national origin discrimination, employers and supervisors should train all personnel to:

- Avoid ethnic jokes.
- Apply discipline consistently, regardless of national origin.
- Document employees' performance honestly and consistently.
- Apply the same standards of hiring, promotion, and performance evaluation to everyone.

☐ **Other Guidelines** **Posting Notices**

Under Title VII, employers with 15 or more employees are required to post conspicuous notices regarding the employer's prohibition of national origin discrimination, as well as other types of discrimination prohibited by Title VII. Please see the [national Notices \(Posting\)](#) section. Please see the [state Notices \(Posting\)](#) section.

Training

Establish a diversity training program to communicate to all employees an established policy against national origin discrimination and the employer's intent to take disciplinary action against violators. Inform employees of their right to bring complaints to management and to the appropriate agencies.

In order to be cost-effective, many professional training programs include instruction on other topics, such as racial discrimination, sexual harassment, and gender discrimination. In the event of a lawsuit alleging discrimination, evidence of a mandatory diversity training program is an excellent means of establishing an employer's good-faith efforts to prevent discrimination in the workplace.

Discipline

Discipline employees consistently, regardless of national origin, and maintain thorough documentation of any disciplinary measures taken. In this regard, employers should take special care to comply with and uniformly apply their human resources policies and procedures regarding discipline. Failure to comply with and consistently apply established policies regarding discipline can be used as evidence of discrimination. Please see the [national Discipline](#) section. Please see the [state Discipline](#) section.

Also, employers should take immediate and reasonable steps to stop any discriminatory conduct by supervisors or other employees. For example, speak directly with the individual who is engaging in discriminatory conduct, warn him or her that such conduct is unacceptable, and if the discriminatory conduct is severe, consider taking formal disciplinary action against the employee.