Proposed EEOC Guidance on National Origin Discrimination Provides Clues to Agency's Focus

By James F. Botana and Paul Patten

June 28, 2016

The Equal Employment Opportunity Commission has issued a Proposed Enforcement Guidance on National Origin Discrimination ("PEG") and is allowing the public to comment through July 1, 2016. The last time the EEOC issued specific guidelines on National Origin Discrimination was in 2002.

Role of the PEG

The PEG is intended to communicate the EEOC's position on national origin discrimination, including how the agency will investigate these types of charges. When it becomes final, the PEG will be included in the EEOC's Compliance Manual and used by EEOC investigators as a resource in conducting investigations. Although the PEG refers to court rulings in this area, this does not mean the EEOC always will follow the majority position of courts on all issues relating to national origin. Rather, the PEG states that, in some cases, the EEOC has its own view on the correct interpretation of the law and will follow its own views.

Underlying Legal Framework

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, sex, and national origin.

Specific Issues

Courts use broadly similar analysis and legal frameworks to evaluate discrimination claims whether those claims be based on race, color, religion, sex, or age. The EEOC's PEG addresses issues that are unique to national origin claims.

The following highlights some of the common national origin discrimination issues the EEOC investigates.

1. Mistaken perception of someone's national origin is not a defense

Under Title VII, an employee is protected from discriminatory conduct based on national origin, even if the employer or coworkers are mistaken as to that employee's national origin. As an example, the EEOC refers to a situation where an employee is harassed for being Arab, even though the employee was from India.

2. When may ask for social security numbers?

The PEG acknowledges that employers have legitimate reasons to ask a job candidate for a social security number and that an employee be assigned a social security number so that employers can report federal wages and taxes to the Social Security Administration (SSA). But according to the EEOC, the U.S. Citizenship and Immigration Services permits employees to work if they have applied for but not yet received a Social Security number.

The PEG further sets forth the EEOC's position that if an employer has a policy or practice that screens out new hires or candidates who lack a social security number, the EEOC may assume that policy has a disparate impact based on national origin. An employer with such a policy or practice will be required to show that the policy or practice is job-related and consistent with business necessity.

3. Human trafficking

The PEG discusses the EEOC's concern that immigrants with limited work authorizations may be targets for abuse, exploitation, harassment, and lower pay. The EEOC notes that it is authorized to seek U-visas for persons who are victims of certain crimes and who assist in the prosecution of those crimes. A U-visa provides temporary immigration benefits, including work authorizations, to eligible persons who might not be otherwise eligible for these benefits.

Meet the Authors

James F. Botana

Principal
Chicago 312-803-2506
Email

Paul Patten

Principal
Chicago 312-803-2570
Email

Practices

Litigation
Workplace Training

4. When can accent be considered a factor for employment decisions?

According to the EEOC, concerns with accents sometimes result in conduct that is national origin discrimination. Therefore, the EEOC will take a "very searching look" at an employer's reasons for using an employee's accent as a basis for an adverse employment decision. Employers only will be able to base employment decisions on accent when the accent "interferes materially with job performance."

5. When can English fluency be considered a factor for employment decisions?

Similar to accent issues, employers may use English fluency as a job criteria only when the lack of fluency interferes with job performance. The EEOC advises employers to assess the level of fluency for a job on a case-by-case basis. In other words, how much English-fluency is required for one job may be different from how much fluency may be required for another job. The EEOC also states that if a candidate or employee is not sufficiently English fluent for one position, the employer should consider that candidate or employee for positions where less or even no fluency is not required.

6. Can employers require foreign language fluency?

The EEOC acknowledges that employers may require foreign language fluency if required for effective job performance. While Title VII prohibits job segregation, the EEOC does not object to employers who assign work or clients based on foreign language fluency.

7. When are English-only rules and other restrictive language policies lawful?

The EEOC views a person's primary language closely tied to his or her cultural and ethnic identity. Therefore, it will look closely at policies that prohibit or restrict a person from speaking in their native, primary language. Employers may run afoul of the EEOC for English-only policies that require the use of English. Broadly, the EEOC will find such policies to violate Title VII in the following circumstances:

- The policies are adopted for a discriminatory reason, *e.g.,* to generate a reason to discipline or terminate people who are not native English speakers.
- The policies are applied in a discriminatory manner, *e.g.,* although the policy requires only English to be spoken, speaking Russian is permitted but speaking Spanish is not.
- The policies have an adverse effect on national origin groups.

The EEOC considers blanket English-only policies (those that bar employees from speaking anything other than English all the time) as presumptively unlawful. The PEG contemplates that policies that limit the use of languages other than English to certain time and places may be valid, but to be found lawful, the policy must be job-related and consistent with business necessity. This "job-related" standard is satisfied when an employer provides detailed, fact-specific, and credible evidence demonstrating:

- The business purpose of the policy is sufficiently necessary to safe and efficient job performance or business operations such that the adverse impact is overridden by the business purpose;
- The policy has proven effective in promoting such a business purpose; and
- The policy is narrowly tailored to minimize any discriminatory impact.

The EEOC provides an example of an English-only policy that meets these standards: a hospital that requires all employees working in an operating room, including cleaning staff, to speak English in the operating room.

While the focus of the PEG is on English-only practices, the EEOC notes that it will scrutinize any "one language only" policy in the same manner. In other words, if an employer asks all employees to speak only in a language other than English, the EEOC will look at whether that policy has the purpose or effect of discriminating against employees because of their national origin.

With respect to any language specific policy, the PEG sets an expectation that employers must provide adequate notice to employees regarding any language specific policy setting forth the circumstances they will be required to speak the specific language and the consequences for not following the rule. The EEOC strongly discourages "draconian" enforcement.

8. Are citizenship requirements lawful?

The EEOC acknowledges that employers are prohibited by immigration laws from hiring individuals who are not authorized to work.

The U.S. Supreme Court has ruled that citizenship status is not encompassed within Title VII's ban on national origin discrimination. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 90-91 (1973) (no Title VII violation in denying employment to Mexican national with U.S. work authorization; over 90 percent of company's employees were U.S. citizens with Mexican ancestry). Instead of focusing on the Supreme Court's conclusion, the EEOC stresses the decision's cautionary advice that the use of citizenship requirements will be found to violate Title VII if the requirement is a scheme to discriminate on the basis of national origin.

Statutes other than Title VII provide sufficient reason for employers to be vigilant in not discriminating on the basis of citizenship. The PEG points out that the Immigration Reform and Control Act of 1986 prohibits citizenship discrimination. Additionally, the Fair Labor Standards Act requires that employees who are not U.S. citizens be paid no less than the federal minimum wage.

9. Can an employer use a customer's preference for a specific national origin as a reason to take action against an employee?

The PEG stresses that customer or coworker preference is no defense to a decision that is made on the basis of national origin: "An employment decision based on the discriminatory preferences of others is itself discriminatory." Employers should note that the EEOC's vigilance against customer preference is not limited to national origin, but to all other characteristics protected under the laws the EEOC enforces.

***

The PEG contains more than two dozen "examples," including the EEOC's conclusions as to whether an employer's conduct in each of the examples is national origin discrimination in violation of Title VII. Employers could consult these examples when addressing issues relating to the national origin of their employees.

For any questions about the EEOC PEG or national origin discrimination, feel free to contact the Jackson Lewis attorney with whom you work.