

Employment Law for Business, 6th ed.
Bennett-Alexander

Chapter 10

National Origin Discrimination

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Statutory Basis

- Sec. 703(a) of Title VII of the Civil Rights Act of 1964
- The Immigration Reform and Control Act of 1986.

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Chez/Casa/Fala/Wunderbar Uncle Sam

- Salad bowl
- Stew
- Section 1981 of the Civil Rights Act of 1866
- EEOC complaints on the rise

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Myths about National Origin Discrimination

- “Citizenship” and “national origin” are synonymous
- A restaurant may hire whomever it wishes to represent the national origin of the restaurant
- It is not illegal discrimination for an employer to require that employees speak only English at work

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Background

- An employer may not:
 - Group its employees on the basis of national origin
 - Make employment decisions on that basis
 - Implement policies or programs that affect those with one national origin differently than those of a different group

National origin discrimination protection

It is unlawful for an employer to limit, segregate, or classify employees in any way on the basis of national origin that would deprive them of the privileges, benefits, or opportunities of employment.

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Member of the Protected Class

- No protection based on status as aliens
- National origin encompasses:
 - Employee’s place of birth
 - Ethnic characteristics or origins
 - Physical, linguistic, or cultural traits closely associated with a national origin group

National origin

Individual’s or her or his ancestor’s place of origin (as opposed to citizenship), physical, cultural, or linguistic characteristics of an origin group.

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Qualification/BFOQs

- Claimant must show that he or she meets the job's requirements
- No accommodation of one's national origin is required of employers
 - Example: attire of national origin, such as traditional African dress
- An employer may set forth why an employee's being of a specific national origin is necessary for the position

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English Fluency and Speaking Native Languages in the Workplace

- Employers should not permit managers to arbitrarily impose language restrictions
- To be protected the employer must show:
 - English fluency is required for the job
 - The requirement is necessary to maintain supervisory control of the workplace
- English-only rules

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Adverse Employment Action and Dissimilar Treatment

- Adverse affects:
 - Demotion
 - Termination
 - Removal of privileges afforded to other employees
- Disparate treatment
 - Being treated differently from other employees who were similarly situated but not members of a protected class

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Harassment on the Basis of National Origin

- Claims have been on the increase
- Not all harassment is prohibited
 - Must be severe or pervasive
- Common concerns include:
 - Ethnic slurs
 - Workplace graffiti
 - Other offenses based on employee traits
- Employers must prevent and correct national origin harassment

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Guidelines on Discrimination Because of Religion or National Origin

- Applies to federal agencies or employers who enter into contracts with a government agency
- Individuals must be hired and retained without regard to their religion or national origin
- Provisions include these ethnic groups:
 - Eastern, Middle, and Southern European ancestry, including Jews, Catholics, Greeks, and Slavs
 - Blacks
 - Spanish-surnamed Americans
 - Asians
 - Native Americans

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Middle Eastern Discrimination After September 11, 2001

- “Code Z”
- Key discrimination issues:
 - Different treatment due to attire
 - Ethnic harassment, particularly in relation to security concerns
 - More stringent security checks or other preemployment requirements
- Remaining sensitive to such employee’s concerns in job assignments and work-related activities is key to their effective resolution

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Citizenship and the Immigration Reform Control Act

- Legal aliens are often restricted from access to certain government or other positions by statute
 - “Political function” exception
- Immigration Reform and Control Act
- Title VII does not require proof of discriminatory intent
- IRCA requires that the adverse action be knowingly and intentionally discriminatory

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Undocumented Workers

- IRCA makes it unlawful for any person knowingly to hire, recruit, or refer for a fee any alien not authorized to work
- GAP inspections
- Workers’ undocumented status does not justify workplace discrimination
- Threats of reports to the INS
- Protection of unauthorized workers from abuse

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Alternate Basis for National Origin or Citizenship Discrimination

- Identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics
- Section 1981 – discrimination because of what they are
 - Being Jewish vs. being Amish

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The Changing Workforce

- Increase in the number of immigrants
- Projected workforce percentages for 2008:
 - African Americans: 11.5%
 - Hispanics: 12.7%
 - Asians, Pacific Islanders, American Indians, and Alaska Natives: 5.2%
- Adherence to Title VII should be viewed as a business imperative
- Employers must be cognizant of the varying needs of employees from different backgrounds

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Summary

- Title VII, the Civil Rights Act of 1964, makes it an unlawful employment practice for employers to limit, segregate, or classify employees in any way that would deprive them of employment opportunities based on their national origin.
- An employee or applicant must show the following to be successful in a claim of discrimination based on national origin discrimination:
 1. The individual is a member of a protected class.
 2. The individual was qualified for the position at issue.
 3. The employer made an employment decision against the individual.
 4. The position was filled by someone not in a protected class.

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Summary (continued)

- “National origin” refers to an individual’s ancestor’s place of origin or physical, cultural, or linguistic characteristics of an origin group.
- An employer has a defense against a national origin discrimination claim if it can show that the national origin is a bona fide occupational qualification.
- No accommodation of a worker’s national origin is required, as it would be required in situations involving disability or religion.
- English-only rules applied at all times are presumptively discriminatory, according to the EEOC. If the employer is considering an English-only rule, it is recommended that the employer should:
 1. Consider whether the rule is necessary.
 2. Determine if the rule is a business necessity.
 3. Consider if everybody is fluent in English.
 4. Communicate the rule to employees.
 5. Enforce the rule fairly.

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Summary (concluded)

- An alternative basis for national origin or citizenship discrimination is section 42 USC 1981.
- Guidelines on Discrimination Because of Religion or National Origin are federal guidelines that apply to federal contractors or agencies and impose on those employers an affirmative duty to prevent discrimination.
- The Immigration Reform and Control Act, unlike Title VII, prohibits, in certain circumstances, discrimination on the basis of citizenship. The act does allow for discrimination in favor of U.S. citizens where applicants are equally qualified.
- Two statutorily allowed BFOQs under IRCA are:
 1. English-language skill requirements that are reasonably necessary.
 2. Citizenship requirements specified by law, regulation, executive order, government contracts, or requirements established by the U.S. attorney general.

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