FEHC Proposes New Regulations on National Origin Discrimination

Insights
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There has been a lot of animated discussion in the news recently about immigration status, national security policy, and country of origin as these issues relate to federal policy. Think "travel ban" and "extreme vetting" – both new terms in our national lexicon. In addition to making for awkward dinner conversation, these topics also raise issues for employers as both state and federal law prohibit discrimination based on national origin.

In the midst of this controversial discussion at the federal level, California is seeking to amend its current rules to be more prescriptive and provide further protection for job applicants and workers.

On June 2, 2017, the California Fair Employment and Housing Council (FEHC) provided notice of its intention to amend existing regulations that prohibit employment discrimination on the basis of national origin. Although the FEHC has been discussing these regulations in draft form for some time, this represents the first formal notice of FEHC's intent to issue new regulations.

These proposed regulations appear largely to be based on guidance issued by the federal Equal Employment Opportunity Commission (EEOC) in November 2016 – the first time the EEOC had updated its national origin guidelines since 2002.

Expanded Definition of National Origin
The regulations expand the definition of "national origin" to include, but not be limited to, the following:

- The individual's or ancestor's actual or perceived place of birth or geographic origin, national origin group or ethnicity.
- The physical, cultural, or linguistic characteristics of a national origin.
- An individual's marriage to, or association or perceived association with, a person of a national origin group.
- An individual's parental relationship (including an adoptive, step or foster parent relationship) with a person for a national origin group.
- Membership in or association with an organization identified with or seeking to promote the interests of a national origin group.

- Attendance or participation in schools, churches, temples, or mosques, or other institutions generally associated with a national origin group.
- Language and/or accent.
- Tribal affiliation.

Language Restrictions, Accents and English Proficiency

One issue that employers often struggle with is how to address language restrictions and English proficiency in the workplace. The existing regulations provide that an employer may have an English-only policy for certain times so long as the employer can show that the rule is justified by business necessity and the employer has clearly communicated the policy to employees.

However, the new proposal elaborates and expands on these provisions, and provides greater detail.

First, the proposal specifies that an English-only policy is unlawful unless (1) it is job-related and consistent with business necessity, (2) it is narrowly tailored, and (3) the employer has effectively notified the employees of the policy and any consequences for violating the language restriction.

"Business necessity" means an overriding legitimate business purpose such that (1) the policy is necessary to the safe and efficient operation of the business, (2) the policy effectively fulfills the business purpose it is supposed to serve, and (3) there is not less discriminatory alternative. English-only rules are presumed to be unlawful unless the employer can prove these elements of business necessity.

Second, the proposed rules state that it is not sufficient that the employer's policy merely promotes "convenience" or is due to "customer preference" – those reasons won't cut it. Moreover, the new proposal clarifies that English-only rules are never lawful during an employee's non-work time (such as rest or meal periods or unpaid employer-sponsored events).

Third, the draft regulations provide that discrimination based on an applicant's or employee's accent is unlawful unless the employer proves that the accent interferes materially with the individual's ability to perform the job in question.

Fourth, the proposal states that discrimination based on an individual's English proficiency is unlawful unless English proficiency is necessary for performance of the specific job at issue, and the type and degree of proficiency required is tailored to the requirements of the job.

Foreign Training and Experience

Some employers express a preference for candidates who have been trained in the United States or have work experience here. However, the new proposed rules state clearly that it is unlawful (unless pursuant to a permissible defense) for an employer to deny employment opportunities because an individual received training or education outside the United States. Under this proposal, it is also unlawful to require an individual to be foreign trained.

Recruitment and Job Segregation
The proposed rules make it unlawful for an employer to seek, request or refer applicants or employees based on national origin. It is also unlawful to assign positions, facilities or geographical areas of employment based on national origin, unless pursuant to a permissible defense.

Height and Weight Requirements
The proposal also states that, unless an employer has a permissible defense, it is unlawful to impose height and/or weight requirements upon applicants or employees. In its Initial Statement of Reasons accompanying the proposed regulations, the FEHC states that this language is "necessary to make clear that height and/or weight requirements can result in discrimination on the basis of national origin, as there are height and weight characteristics associated with particular national origin groups that create disparate impacts on the basis of various national origins."

Immigration-Related Practices
The proposed regulations clarify that FEHA and its regulations apply to undocumented workers to the same extent that they apply to any other applicant or employee, and immigration status is irrelevant during the liability phase of any proceeding brought to enforce FEHA. Furthermore, the proposal states that discovery into an individual's immigration status may permitted only when it is shown by clear and convincing evidence that the inquiry is necessary to comply with federal immigration law.

In addition, the proposal makes it unlawful for an employer to discriminate against an employee due to 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.

Finally, the proposal states that specified immigration-related retaliation is against the law (such as threatening to contact immigration authorities).

What's Next?
The FEHC will hold a public hearing at 10:00 a.m. on July 17, 2017 in San Francisco to consider these proposed regulations and solicit public comment. In addition, written comments may be submitted until that date. Details on the public hearing or where to submit written comments may be found here.

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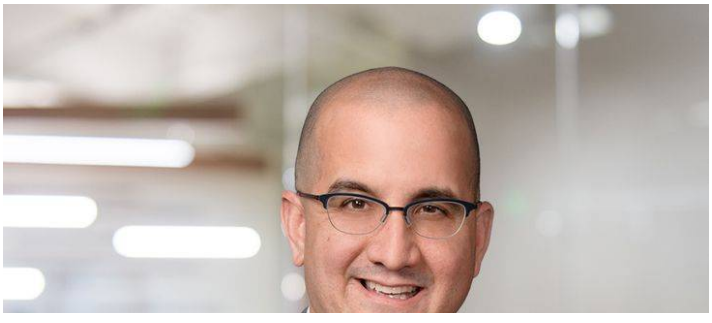

Benjamin M. Ebbink
Partner
916.210.0400
Email