New California Regulations on National Origin Discrimination Effective July 1

Insights
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Issues related to immigration status, national security policy, and country of origin continue to be a hot topic of animated discussion at the federal level. In the midst of this national debate, California has amended its regulations related to national origin discrimination to be more prescriptive and to provide further protection for job applicants and workers.

As we discussed last year, the California Fair Employment and Housing Council (FEHC) proposed amendments to its regulations related to discrimination based on national origin. After several rounds of public comment and discussion, these regulations were finalized on May 17, 2018, and go into effect on July 1, 2018.

Expanded Definition of National Origin
The regulations expand the definition of "national origin" to include, but not be limited to, the individual's or ancestor's actual or perceived:

- Physical, cultural or linguistic characteristics associated with a national origin group.
- Marriage or association with persons of a national origin group.
- Tribal affiliation.
- 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, mosques, or other religious institutions generally used by persons of a national origin group.
- Name that is associated with a national origin group.

Language Restrictions
One issue that employers often struggle with is how to address language restrictions 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.

The new rules change these standards.

First, the regulations provide that it is unlawful for an employer to have a policy that limits or prohibits the use of any language in the workplace (including English-only rules) unless:

- The language restriction is justified by business necessity;
- The language restriction is narrowly tailored; and
- The employer has effectively notified its employees of the circumstances and time when the language restriction is required to be observed and of the consequence for violating the language restriction.

Thus the new regulations contain a presumption that English-only rules violate the law unless the employer can prove the elements listed above. "Business necessity" means an overriding legitimate business purpose such that (1) the language restriction is necessary to the safe and efficient operation of the business, (2) the language restriction effectively fulfills the business purpose it is supposed to serve, and (3) there is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact.

Second, the new rules state that it is not sufficient that the employer's language restriction merely promotes business convenience or is due to customer or co-worker preference. Moreover, the new rules specify that English-only rules are never lawful during an employee's non-work time (breaks, lunch, unpaid employer-sponsored events, etc.).

Accents

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

English Proficiency

Discrimination based on an applicant's or employee's English proficiency is unlawful unless the English proficiency requirement is justified by business necessity (i.e., the level of proficiency required by the employer is necessary to effectively fulfill the job duties of the position). The new rules state that relevant factors include, but are not limited to, the type of proficiency required (spoken, written, aural, and/or reading comprehension), the degree of proficiency required, and the nature and job duties of the position.

The new regulations clarify that it is not unlawful for an employer to request from an applicant or employee information regarding his or her ability to speak, read, write or understand any language, including languages other than English, if justified by business necessity.

Recruitment and Job Segregation

The new 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 employees to positions, facilities or geographical areas based on national origin, unless pursuant to a permissible defense.

Height and Weight Requirements

The new regulations specify that height and weight requirements may have the effect of creating a disparate impact on the basis of national origin. Where an adverse impact is established, such height and weight restrictions will be unlawful, unless the employer can demonstrate that they are job-related and justified by business necessity. However, even if the employer proves that they are job-related and justified by business necessity, it is still unlawful if the purpose of the requirement can be achieved as effectively through less discriminatory means.

Human Trafficking

Human trafficking continues to be a popular topic for legislative and regulatory activity, especially as it relates to employers. These new rules make it unlawful for an employer to "use force, fraud, or coercion to compel the employment of" (or subject to adverse treatment), applicants or employees on the basis of national origin.

Harassment

Under the new regulations, it is unlawful for an employer to harass an applicant or employee on the basis of national origin. The use of epithets, derogatory comments, slurs, or non-verbal conduct based on national origin, including, but not limited to, threats of deportation, derogatory comments about immigration status, or mockery of an accent or a language or its speakers may constitute harassment if the actions are severe or pervasive such that they alter the conditions of the employee's employment and create an abusive working environment. A single unwelcome act of harassment may be sufficiently severe so as to create an unlawful hostile work environment.

Retaliation

The new regulations also adopt new language related to protections against retaliation based on national origin.

First, the language makes it unlawful for an employer to retaliate against any individual because the individual has opposed discrimination or harassment on the basis of national origin, has participated in the filing of a complaint, or has testified, assisted, or participated in any other manner in a proceeding in which national origin discrimination or harassment has been alleged.

Second, the regulations specify that retaliation may include, but is not limited to, threatening to contact or contacting immigration authorities or a law enforcement agency about the immigration status of the employee, former employee, applicant, or a family member (e.g., spouse, domestic partner, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, great-grandparent, grandchild, or great-grandchild, by blood, adoption, marriage, or domestic partnership) of the employee, former employee, or applicant.

Retaliation may also include taking adverse action against an employee because the employee updates or attempts to update personal information based on a change of name, social security number, or government-issued employment documents.

Similar provisions related to retaliation on the basis of immigration status already exist in the Labor Code. Placing similar restrictions in these new regulations under FEHA will expand liability for employers for these actions.

Immigration-Related Practices

The new regulations clarify that FEHA and its regulations apply to undocumented applicants and employees 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 rules state that discovery or other inquiry into an individual's immigration status shall not be permitted unless it is shown by clear and convincing evidence that the inquiry is necessary to comply with federal immigration law.

In addition, new regulations make it unlawful for an employer to discriminate against an employee or applicant 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 rule states that specified immigration-related retaliation is against the law (such as threatening to contact immigration authorities).

Next Steps for Employers

California employers should closely review these new regulations to ensure compliance with the law. In particular, employers may want to update their non-discrimination or equal employment opportunity (EEO) polices to reflect these new provisions. In addition, any employer that has language restrictions or English-only policies will need to carefully review those policies to see whether they comply with the requirements and restrictions contained in the new regulations. Appropriate staff may need to be trained on these new provisions, and harassment training should include harassment and discrimination based on national origin.

If you have any questions about these new regulations, or how they may affect your organization, please contact your Fisher Phillips attorney or one of the attorneys in any of our California offices:

Irvine: 949.851.2424
Los Angeles: 213.330.4500
Sacramento: 916.210.0400
San Diego: 858.597.9600
San Francisco: 415.490.9000

Related People

Benjamin M. Ebbink
Partner
916.210.0400
Email