

# English-Only Policies in the Age of Multiculturalism

Insights

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The United States has long been referred to as a melting pot. But, some commentators challenge this notion, offering instead that the United States is more akin to a meal of separate and diverse ingredients; an orchestra of individual musicians who together create a symphony. While members of the United States' many ethnic groups still engage in some assimilation – namely the adoption of the English language – they need not totally abandon their cultural heritage in order to fit into the framework of today's America. This is multiculturalism.

Along with an ever-diversifying America, comes an ever-diversifying American workforce. This workforce, while economically beneficial, can present certain challenges to the American employer. One of the most common challenges concerns the language that members of the workforce speak. While English is still the most predominantly spoken language, many people in the United States speak languages other than English. This has prompted some employers to implement “English-only” policies. At first glance, this may seem like a reasonable way to promote homogeneity in the workplace. Employers should be warned, however: things are not always as they seem.

## English-Only Policies Heavily Scrutinized

English-only policies are heavily scrutinized at practically every level. The Equal Employment Opportunity Commission (“EEOC”) presumes such policies violate Title VII and its prohibition against national origin discrimination, reasoning that such a requirement is likely a mere pretext for unlawful discrimination or that it adversely impacts individuals of a particular national origin whose primary language is not English. Many states have passed legislation prohibiting these policies (e.g., California). Recently, a National Labor Relations Board (“NLRB”) administrative law judge (“ALJ”) found that an English-only policy violated the National Labor Relations Act because it could restrict employees from discussing the terms and conditions of their employment.

## English-Only Policies Still OK . . . Sometimes.

Despite the EEOC's disdain for English-only policies, it recognizes that Title VII permits employers to adopt them when there is a legitimate business necessity for doing so. Where there is such a necessity, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. An English-only rule should be applied in limited circumstances, and only where it is needed for the employer to operate safely or efficiently.

Moreover, employers implementing English-only rules should be able to demonstrate that specific circumstances in the workplace necessitated the decision and that alternative resolutions were explored and exhausted. For instance, the EEOC has indicated that an English-only rule for communications with customers or coworkers who only speak English or in emergency situations where speaking a common language would promote efficiency may constitute business necessity.

Fortunately for employers who wish to implement an English-only policy, the recent ALJ decision gives no indication that the EEOC's already stringent business necessity rule would be tightened by the NLRB.

### **Health System Maintains Broad English-Only Policy**

A large health system maintained an English-only policy that mandated employees speak English in virtually every circumstance – in all communications with each other and communications with (or near) patients; basically, whenever they were on duty. Two employees filed suit seeking to invalidate the policy.

The ALJ noted that this was an issue of first impression for the NLRB. In evaluating whether the policy would have a chilling effect on an employee's exercise of his or her Section 7 rights under the National Labor Relations Act, the ALJ ruled that because the policy was vague as to time and location (i.e., must use English in patient and non-patient areas, in patient access areas, and between employees, staff, customers, patients and visitors), it infringed on an employee's ability to freely discuss and communicate about work conditions, wages and other terms and conditions of employment. With that, the ALJ recommended that the NLRB order the health system to repeal the policy and post notices alerting its employees that they were not required to speak only English while on duty.

Although this decision should come as no surprise given the NLRB's aggressive expansion of employee rights under the Act, it is significant in that employers must now be wary of another federal agency's scrutiny. Said another way, it gives employees yet another reason to complain to the NLRB about an employer's handbook – a handbook that the NLRB will very likely find a way to deem unlawful.

### **A Business Necessity? Practical Tips For Implementing A Valid English-Only Policy.**

Some employers may have a legitimate need for an English-only policy. If done cautiously, those employers can safely implement such a requirement while still embracing a multicultural workforce. First, an employer should carefully weigh business justifications for the policy against possible discriminatory effects, considering evidence of safety or other business justifications (e.g., effective communications with customers), likely effectiveness of the policy in carrying out related objectives, and the English proficiency of impacted workers. An employer should also evaluate how many non-English speaking employees it has, as a policy is arguably more discriminatory if it affects the ability of certain employees to speak at all while in the workplace.

From there, an employer should craft a limited policy (i.e., carving out rest or meal breaks) that simplistically articulates the business necessity. Further, this policy should not prohibit any particular language from being spoken. Finally, if an employer adopts an English-only policy, all employees should be notified of the restriction, the details of the restriction, and any penalty for violating the restriction. Under no circumstances should an employer penalize an employee for violating an English-only policy before the restriction has been communicated to him.

Notwithstanding significant legal hurdles, if an employer is determined to implement an English-only policy, there are steps that can be taken to minimize legal risk. As is often the case, a well-thought and narrowly-tailored policy is the best approach.

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