

## **NATIONAL ORIGIN DISCRIMINATION**

By Ellen C. Meyer

**C**laims of employment discrimination on the basis of religion and national origin have been – relatively speaking – uncommon. That is changing. The United States' Equal Employment Opportunity Commission (EEOC) reports that in 2002, claims of national origin discrimination rose 13%, and claims of religious discrimination rose 21%, over the just previous year. These increases are attributable in large part to persons alleging harassment or other discrimination on the basis of identity as an Arab, Muslim, or Sikh. These statistics require no explanation – and the message to management is clear. Among the other new burdens borne by employers after September 11, 2001 is the need for increased care to ensure that the personal biases of some employees do not translate into illegal discrimination against others – and liability for your company.

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### **This Bulletin**

While it is obvious that employers may not fire or take other adverse action against employees on the basis of their national origins or religions, other aspects of these laws are less well understood. This bulletin serves as a quick guide for employers about those other, lesser known aspects of these laws.

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### **National Origin and Language Rules**

The anti-discrimination laws do not, on their face, prohibit discrimination on the basis of language. In practice, however, they do.

Under the anti-discrimination laws, the term “national origin” is broadly defined. It does not refer only to one’s country of birth or to citizenship. Rather, “national origin” encompasses membership in a group of people sharing a common language, culture, ancestry, ethnicity, or other similar social characteristics or physical, linguistic, or cultural traits. Indeed, even a United States citizen born in the United States

is not barred per se from stating a claim of discrimination on the basis of national origin— if that individual can establish that he was discriminated against because of a perception of his association with a foreign national-origin group.

Under this broad definition of “national origin,” an individual’s regular and primary use of a language other than English may be viewed as a proxy for non-U.S. national origin. Accordingly, there is a growing volume of cases holding that “English only” workplace rules, or job qualifications requiring fluency in English, constitute unlawful discrimination on the basis of national origin.

However, as with every general rule, there is the exception: workplace language restrictions will be upheld where the employer shows them to be “job-related” and “consistent with business necessity.”

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### **Reasonable Accommodation to Religious Practices**

The laws prohibiting discrimination on the basis of religion require more than that employers *not* take adverse employment actions on that basis. They also require that employers take affirmative steps to provide “reasonable accommodations” – through exceptions to their standard practices or policies – to their employees’ religious observances, practices, and beliefs. An employer may be required, for example, to make changes to work schedules in order to allow an employee to observe his annual religious holiday, weekly Sabbath, or daily calls to prayer, provided that the employee is opposed to working at such times under sincerely-held religious beliefs. It may also be required to make an exception to a company dress policy to allow an employee to dress in accordance his religious beliefs – to wear, for example, a turban or hijab.

The exception? An employer will not be required to make an accommodation to an employee's religious observance, practice, or belief where such accommodation would exact an "undue hardship" on the conduct of the business.

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## Customers, Clients, and Coworkers

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When considering what accommodations it will make to its employees' cultural traits or religious practices, an employer may face pressure from its various other constituencies – such as its customers, clients, or other employees – to restrict particular traits or practices. The employer may be told, for example, that its customers are "uncomfortable" with particular displays of religious or national-origin identity. The law, however, gives little traction to such concerns. The preference of others for a ban of a given religious or national-origin practice or display is generally irrelevant to whether the practice constitutes an undue hardship or whether it conflicts with business necessity. The law does not recognize a business justification for accommodating discriminatory animus.

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## "Hostile Work Environment" For Religion or National Origin

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As with the law of sexual harassment, an employer may be held liable if it causes or permits its employees to suffer a "hostile work environment" on the basis of religion or national origin. More specifically, an employer may be held liable where an employee, through his or her employment, suffers severe or pervasive harassment on the basis of such characteristics. Accordingly, to avoid liability under such a theory, management must watch for conduct that stigmatizes or degrades employees on the basis of their religion or national origin, with the same vigilance that it devotes to the prevention of sexual harassment in the workplace.

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## Guidelines

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For further guidance, the following recent publications are available from the Equal Employment Opportunity Commission (EEOC) at [www.eeoc.gov](http://www.eeoc.gov):

- A revised Compliance Manual on National Origin Discrimination, and
- Questions and Answers About Employer Responsibilities Concerning the Employment of Muslims, Arabs, South Asians, and Sikhs.



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