Labor and Employment Alert: California Expands Regulations Regarding National Origin Discrimination

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California's Fair Employment and Housing Act prohibits harassment and discrimination based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation and military and/or veteran status. Recently, the Fair Employment and Housing Council adopted regulations to further implement and interpret the protections against national origin discrimination.

"National origin" defined

The regulations revise the definition of "national origin" to include an individual's or ancestors' actual or perceived:

1. physical, cultural, or linguistic characteristics associated with a "national origin group" (i.e., ethnic groups, geographic places of origin, and countries that are not presently in existence);
2. marriage to or association with persons of a national origin group;
3. tribal affiliation;
4. membership in or association with an organization identified with or seeking to promote the interests of a national origin group;
5. attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of a national origin group; and
6. name that is associated with a national origin group.

English-only rules

An employer may require that employees speak only in English at certain times if the employer can show that the rule is justified by business necessity and has effectively notified its employees of the circumstances and time when speaking only in English is required and of the consequences of violating the rule.

However, it is unlawful to adopt or enforce a policy that limits or prohibits the use of any language in the workplace unless the restriction is justified by business necessity; the 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 restriction. English-only rules are ***never*** lawful during an employee's non-work time, e.g., breaks, lunch, and unpaid employer-sponsored events.

The regulations define "business necessity" as an "overriding" legitimate business purpose, such that: the language restriction is necessary to the safe and efficient operation of the business; the restriction effectively fulfills the business purpose it is supposed to serve; and there is no alternative practice that would accomplish the business purpose equally well with a lesser discriminatory impact. It is not sufficient that the language restriction merely promotes business convenience or is due to customer or co-worker preference.

Accents and English proficiency

Discrimination based on an accent is unlawful unless the employer proves the individual's accent interferes materially with the applicant's or employee's ability to perform the job in question. Similarly, discrimination based on English proficiency is unlawful unless justified by business necessity. In determining business necessity, relevant factors include the type of proficiency required (spoken, written, aural and/or reading comprehension), the degree of proficiency required and the nature and duties of the position. An employer may ask about the ability to speak, read, write or understand any language, including languages other than English, if justified by business necessity.

Unlawful employment practices

The regulations clarify several additional unlawful employment practices. First, the regulations make clear that the civil rights law's protections apply to undocumented applicants and employees to the same extent they apply to any other applicant or employee. Thus, it is unlawful to discriminate against an employee because of the employee's or applicant's 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. It is also generally unlawful to discriminate against an applicant or employee because he or she presents a driver's license issued under California law to undocumented individuals.

Second, citizenship requirements that are a pretext for discrimination or have the purpose or effect of discriminating against applicants or employees on the basis of national origin or ancestry are unlawful.

Third, it is unlawful to harass an applicant or employee on the basis of national origin. For example, 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."

Fourth, height and/or weight requirements may have the effect of creating a disparate impact on the basis of national origin.

Finally, it is generally unlawful for an employer to seek, request, or refer applicants or employees based on national origin or to assign positions, facilities, or geographical areas of employment based on national origin.

Conclusion

California employers should review their policies, procedures and training to ensure that they adequately address national origin discrimination. Contact your Vorys lawyer if you have questions about equal employment opportunity laws.