

Fair Employment & Housing Council Further Modifications to Proposed Regulations Regarding National Origin Discrimination

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 2. Discrimination in Employment

Article 4. National Origin

TEXT

Text proposed to be added for the 45-day comment period is displayed in underline type.

Text proposed to be deleted for the 45-day comment period is displayed in ~~striketrough~~ type.

Text proposed to be added for the 15-day comment period is displayed in double underline type.

Text proposed to be deleted for the 15-day comment period is displayed in ~~double striketrough~~ type.

Text proposed to be added for the second 15-day comment period is displayed in **bold** type.

Text proposed to be deleted for the second 15-day comment period is displayed in *italics* type.

Article 4. National Origin

§ 11027. Defenses.

These regulations incorporate the defenses set forth in section 11010.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12940, Government Code.

§ 11027.1. Definitions.

(a) “National origin” includes but is not limited to, the individual’s or ancestors’ actual or perceived:

(1) physical, cultural, or linguistic characteristics associated with a national origin group;

(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.

(b) “National origin groups” include, but are not limited to, ethnic groups, geographic places of origin, and countries that are not presently in existence.

~~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 with a person of a national origin group, including an adoptive, step, or foster care parental relationship; 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; actual or perceived association of an individual’s name with a national origin group; and language and/or accent. National origin also includes an individual’s tribal affiliation.~~

(c) “Undocumented applicant or employee” means an applicant or employee who lacks legal authorization under federal law to work in the United States.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12940, Government Code.

§ 11028. Specific Employment Practices.

(a)-(c) (Reserved)

~~(d) An employer may have a rule requiring that employees speak only in English at certain times, so long as the employer can show that the rule is justified by business necessity (See section 11010(b)) and the employer 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.~~

(a) Language Restrictions.

(1) It is an unlawful employment practice for an employer or other covered entity to adopt or enforce a policy that limits or prohibits the use of any language in the workplace, including, but not limited to, an English-only rule, unless:

(A) The policy is ~~job related and consistent with~~ justified by business necessity;

(B) The policy is narrowly tailored; and

(C) 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.

(2) For purposes of this subsection, “business necessity” means an overriding legitimate business purpose, such that:

(A) The policy is necessary to the safe and efficient operation of the business;

(B) The policy effectively fulfills the business purpose it is supposed to serve; and

(C) There is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact.

(3) It is not sufficient that the employer's policy merely promotes business convenience or is due to customer or co-worker preference.

(4) English-only rules are presumed to violate the Act on the basis of national origin and ancestry, unless the employer can prove the elements listed in § 11028(a)(1)(A)-

(C). business necessity. English-only rules are never lawful during an employee's non-work time, e.g. breaks, lunch, unpaid employer-sponsored events, etc.

(b) Employment 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.

(c) Discrimination based on an applicant's or employee's English proficiency is unlawful unless the English proficiency requirement at issue 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.)** In determining business necessity in this context, relevant factors include, but are not limited to, the type of proficiency required (i.e., spoken, written, aural, and/or reading comprehension), the degree of proficiency required, and the nature and job duties of the position. *necessary for the effective performance of the specific position for which it is imposed; and a (i.e. a lower the level of fluency type and degree of proficiency required is tailored to the requirements of would materially interfere with the applicant's or employee's ability to perform the duties of the position in question).*

(d) 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.

~~(d) Foreign training and experience. It is an unlawful employment practice, unless pursuant to a permissible defense, for an employer or other covered entity to deny employment opportunities to an individual because the individual received training or education outside the United States, or to require an individual to be foreign trained.~~

(e) Retaliation. It is an unlawful employment practice for an employer or other covered entity 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. Retaliation may include, but is not limited to:

(1) 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; or

(2) 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.

(f) Immigration-related Practices.

(1) All provisions of the Act and these regulations apply to undocumented workers, applicants and employees to the same extent that they apply to any other applicant or employee. An employee's or applicant's immigration status is irrelevant during the liability phase of any proceeding brought to enforce the Act.

~~(2) Discovery or other inquiry shall not be permitted into an employee's or applicant's immigration status during the liability phase of any proceeding brought to enforce the Act. Such discovery or other inquiry, moreover, may be permitted only where the person seeking to make the inquiry has shown by clear and convincing evidence that such inquiry is necessary to comply with federal immigration law. For example, if an employer is found to be liable for violating the rights of an undocumented employee under the Act, the remedy of reinstatement will not be available.~~

The immigration status of an applicant or employee is irrelevant to the issue of liability under the Act. Moreover, discovery or other inquiry into an applicant's or employee's immigration status shall not be permitted unless the person seeking discovery or making the inquiry has shown by clear and convincing evidence that such inquiry is necessary to comply with federal immigration law. For example, if an employer is found to be liable under the Act but establishes by clear and convincing evidence that the applicant or employee is undocumented, the remedy of reinstatement will not be available.

(3) It is an unlawful practice for an employer or other covered entity 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.

(4) It is an unlawful practice for an employer or other covered entity to retaliate against an employee for engaging in activity protected by the Act. Retaliatory actions may include, but are not limited to, threatening to contact or contacting immigration or law enforcement authorities. (See generally § 11028(e).)

~~(4) It is an unlawful employment practice for any employer or other covered entity to retaliate against any person as defined in § 11028(f). Retaliation may include, but is not limited to:~~

~~(A) threatening to contact or contacting immigration authorities or a law enforcement agency about the immigration status of the employee, former employee, or applicant or a family member (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; or~~

~~(B) 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.~~

~~(45) For purposes of this subsection, “undocumented applicant or employee~~worker~~” means an applicant or employee or job applicant who lacks legal authorization under federal law to work in the United States.~~

(eg) It is unlawful for an employer or other covered entity to discriminate against an applicant or employee because he or she holds or presents a driver’s license issued under section 12801.9 of the Vehicle Code.

(1) An employer or other covered entity may require an applicant or employee to hold or present a license issued under the Vehicle Code only if:

(A) Possession of a driver’s license is required by state or federal law; or

(B) Possession of a driver’s license is required by the employer or other covered entity and is otherwise permitted by law. An employer’s or other covered entity’s policy requiring applicants or employees to present or hold a driver’s license may be evidence of a violation of the Act if the policy is not uniformly applied or is inconsistent with legitimate business reasons (i.e., possessing a driver’s license is not needed in order to perform an essential function of the job).

(2) Nothing in this subsection shall limit or expand an employer’s authority to require an applicant or employee to possess a driver’s license.

(3) Nothing in this subsection shall alter an employer’s or other covered entity’s rights or obligations under federal immigration law.

~~(fh) Citizenship requirements. 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 are unlawful, unless pursuant to a permissible defense.~~

(i) Human Trafficking. It is an unlawful employment practice for an employer or other covered entity 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.

(j) Harassment. It is unlawful for an employer or other covered entity to harass an applicant or employee on the basis of national origin. (See generally section 11019(b).) **The use of epithets, derogatory comments, or slurs based on national origin, including, but not limited to, threats of deportation, derogatory comments about immigration status, and mockery of 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. (See generally section 11034(f)(2)(A).)**

(k) Height and/or weight requirements. Such requirements **may** have the *foreseeable* effect of creating a disparate impact on the basis of national origin. Where an adverse impact is **established**~~created~~, such requirements are unlawful, unless the employer can demonstrate that they are job related and justified by business necessity. **Where such a requirement is job related and justified by business necessity, it is still unlawful if the applicant or employee can prove** *and provided* that the purpose of the requirements *cannot* be achieved as effectively through less discriminatory means. ~~It is an unlawful employment practice, unless pursuant to a permissible defense, for an employer or other covered entity to impose height and/or weight requirements on applicants or employees.~~

(l) Recruitment and job segregation. It is an unlawful employment practice for an employer or other covered entity 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, unless pursuant to a permissible defense.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12926, ~~and~~ 12940, and 12951, Government Code.