

National Origin Discrimination Checklist

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National origin discrimination may not be as high on your radar screen as sex, race, or disability discrimination, but it accounted for almost 11% of the total number of charges filed with the ***Equal Employment Opportunity Commission (EEOC)*** in fiscal year 2015. The numbers are even higher for states with more diverse populations – 18.1% of total charges for New Mexico were for national origin discrimination, 16.6% in California, 16.2% in Colorado, and 15.3% in Texas, to name a few.

Title VII Prohibits National Origin Discrimination

As you may know, Title VII, which applies to employers with 15 or more employees, prohibits employment discrimination on the basis of race, color, religion, sex, and national origin. Its protections extend to all employees and applicants for employment in the United States.



The EEOC defines national origin discrimination as discrimination because an individual, or his or her ancestors, is from a certain country or region, or shares the physical, cultural, or language characteristics of a national origin or ethnic group. For example, national origin discrimination would result from treating an employee adversely because he or she is from another country or former country (such as Mexico, China, or Yugoslavia), a place that is closely associated with an ethnic group but is not a country (such as Kurdistan), or belongs to a group that shares a common language, ancestry, or other social characteristics (such as Arabs or Hispanics).

While outright discrimination may be more obvious, Title VII also prohibits less straightforward forms of discrimination. For example, Title VII prohibits associational discrimination, which is when an

employer treats an applicant or employee less favorably because he or she associates with (e.g., dates, marries, lives with, is the parent of, etc.) someone of a particular national origin. Employment discrimination also results when an employer treats an individual less favorably because he or she does *not* belong to a particular ethnic group. For example, a Hispanic business owner who refuses to hire anyone other than Hispanics would be discriminating on the basis of national origin. Moreover, discrimination based on the perception or belief that an individual (or his or her ancestors) belongs to a particular national origin group can be discriminatory, regardless of whether the individual is in fact part of that group.

In addition to prohibiting discriminatory employment decisions, Title VII also prohibits unlawful harassment and retaliation based on national origin. Harassment can include the use of ethnic slurs, intimidation, threats, mocking, and other verbal, written, or physical conduct that is directed toward an individual because of his or her birthplace, ethnicity, culture, language, dress, or accent.

EEOC Issues Updated National Origin Discrimination Guidance

In late 2016, the EEOC published an [updated enforcement guidance](#) on national origin discrimination. Intending to better explain employee rights and promote employer compliance, the EEOC guidance offers many examples and HR practices in a wide variety of employment situations that could result in Title VII national origin violations. In addition, it addresses how national origin discrimination often intersects with other protected characteristics, such as race, color, or religion. The updated guidance includes several noteworthy points:

- A place of national origin may be within the United States; in other words, “[n]ational origin discrimination includes discrimination against American workers in favor of foreign workers.”
- Title VII applies to human trafficking. The guidance explains that, in addition to criminal liability for forcing labor and/or exploiting workers, Title VII may also impose civil liability if the conduct is directed towards person(s) in a protected class, including national origin.
- The joint employer doctrine applies in the context of staffing firms and client employers. The guidance explains that, “[i]f both a staffing firm and a client employer have the right to control the worker’s employment and have the statutory minimum number of employees,” the entities can be considered joint employers. As an example, a staffing firm can be held liable under Title VII if it were to fail to take prompt corrective action for discriminatory actions based on national origin by the client employer.
- Recognizing that employees have a choice as to which documents to present to establish authorization to work in the U.S., and that “newly hired employees should be allowed to work if they have applied for but not yet received a Social Security number,” the guidance states that a blanket policy not to hire candidates who lack a Social Security number can violate Title VII if it disproportionately screens out work-authorized individuals in a national origin group.
- Preference for U.S. citizenship may be unlawful if it has the purpose or effect of discriminating on the basis of national origin.

We encourage you to review the EEOC's guidance document.

Checklist For Avoiding National Origin Discrimination Liability

To put the EEOC's guidance into practical terms, here is a handy checklist that highlights concrete HR policies and employment practices to help your organization avoid liability for national origin discrimination or harassment.

- Your job application and posts should include an equal employment opportunity statement.
- When recruiting applicants and posting job openings, do not:
 - state a preference for (or against) a particular national origin (e.g., “looking for U.S.-born candidates” or “must not speak with a foreign accent,” etc.);
 - rely only on word-of-mouth referrals from existing employees (keeps applicant pool too homogenous); or
 - send job postings only to non-diverse outlets or communities.
- Be careful not to reject applicants based on an ethnically sounding name; consider redacting or hiding names on your initial review of applications and resumes so you are not inadvertently influenced by an ethnic name.
- During interviews, do not ask candidates about their ethnic heritage, ancestry, accent, or any other direct or indirect questions about national origin, even if you are just trying to be friendly or curious.
- If you conduct background checks or pre-employment testing, conduct it on *all* candidates/employees in a particular job category – do not single out only those individuals with foreign-sounding names, accents, etc. for such tests.
- Refrain from segregating or isolating employees based on their national origin (e.g., do not assign all Hispanic workers to lower-paying positions, or keep all Filipino employees away from the public, etc.).
- Be careful imposing an English-only language rule – any restriction on language spoken at work must be job related and consistent with business necessity, and should not be imposed during employee breaks or other employee personal time while on the employer's premises.
- Make sure your harassment policy prohibits harassment based on national origin, and that you train your employees to avoid using ethnic slurs, stereotypes, name calling, mocking tones, etc.
- Remember that customer and coworker preferences or prejudices do not justify discriminatory hiring, firing, promotion, or discipline decisions.

A culturally diverse workplace can present unique issues for management but can also help

employers remain relevant in our increasingly diverse society. Use this checklist to help avoid potential liability for national origin discrimination in your workplace. Additional information on national origin discrimination may be found on the EEOC's [question-and-answer publication](#) and [small business fact sheet](#).

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