

# California's FEHC Adopts New National Origin Discrimination Regulations

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On July 1, 2018, new regulations from California's Fair Employment and Housing Council (FEHC) that clarify protections from national origin discrimination will go into effect. [The new regulations](#) are extensive and include clarifications on the definitions of "national origin" and "national origin groups," the permissible and prohibited types of employer policies governing language restrictions in the workplace, the permissible and prohibited inquiries regarding immigration status, and the permissible and prohibited types of height and weight requirements for work.

## The Meaning of "National Origin" and "National Origin Groups"

The new regulations clarify that the definition of "national origin" includes an individual's "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 national origin group; and
- (6) name that is associated with a national origin group."

The Equal Employment Opportunity Commission (EEOC) and various courts have provided the following examples of the types of associational and perception-based harassment and discrimination based on national origin that are prohibited:

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- Harassment of an employee whose husband is from Afghanistan
  - Refusal to promote an employee because he attends a mosque
  - Harassment of a Hispanic person by a harasser who perceived that the individual was Pakistani
  - Coworkers repeatedly referring to an employee of Indian descent as “Taliban” or “Arab”
  - Harassment of a Sikh man wearing a turban because the harasser perceived him to be Muslim

The regulations also provide that “national origin groups” include “ethnic groups, geographic places of origin, and countries that are not presently in existence.” In other guidance from the EEOC, the commission has explained that a geographic region may include “a region that never was a country but nevertheless is closely associated with a particular national origin group, for example, Kurdistan or Acadia.”

## **Prohibitions Against Language Restrictions**

Since 2001, California has prohibited employers from adopting or enforcing a policy that limits or prohibits the use of any language in the workplace, unless a business necessity justified the restriction and the employer met certain notice requirements. According to the new regulations, if an employer has a policy limiting or prohibiting the use of a language, the employer now has to meet a third requirement and also show that the restriction is “narrowly tailored.” Also, a language restriction that “merely promotes business convenience or is due to customer or co-worker preference” will not pass the test.

The new regulations also specifically target “English-only rules,” stating that they are presumptively illegal unless the employer can meet the three-part test by proving that the rule is justified by business necessity, is narrowly tailored, and was effectively explained to employees. “Business necessity” is defined as an overriding legitimate business purpose, such that “(A) [t]he language restriction is necessary to the safe and efficient operation of the business; (B) [t]he language restriction effectively fulfills the business purpose it is supposed to serve; and (C) [t]here is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact.”

The new regulations also state that “English-only rules are never lawful during an employee’s non-work time,” such as breaks, lunch, and unpaid employer-sponsored events. The FEHC further commented in the regulation making process that an employer’s attempt to restrict language use during nonworking hours may involve sufficient employer “control” over that time to make it compensable.

## **Restrictions on Immigration-Related Practices**

The new regulations also place several restrictions on immigration-related practices. For example, an employer cannot make inquiries into an employee’s immigration status “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.” It is also unlawful for an employer to discriminate

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or retaliate against an employee because of the employee'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."

## **Connecting Height and Weight Requirements to National Origin Discrimination**

The new regulations expressly state that height and weight requirements may be unlawful because they may have the effect of discriminating based on national origin. Where an employee shows that a height or weight requirement has an adverse impact, the requirement is unlawful unless it is job related and justified by business necessity, and its purpose cannot be achieved as effectively through other means.

According to the FEHC, there is a nexus between various national origins and certain physical characteristics. The regulations aim to prohibit height and weight restrictions that have the effect of disparately impacting certain national origin groups.

### **What Can Employers Do?**

#### *Review the Company's EEO Policies*

Employers may want to ensure that their equal employment opportunity (EEO) policies expressly prohibit associational and perception-based harassment and discrimination based on national origin.

#### *Review Language Restrictions*

If a company has language restrictions in place, it may want to consider whether those restrictions meet the requirements in the new regulations. Also, it may want to delete any language restrictions on employees during their duty-free time, including during meal and rest breaks.

#### *Review Height and Weight Requirements*

If a company has any height or weight requirements, it may want to review the reasons for them, determine whether they are job related and justified by business necessity, and consider whether their purpose can be achieved as effectively through less discriminatory means.

#### *Conduct Training*

A business can review its harassment prevention training materials to ensure that they cover associational and perception-based harassment and discrimination based on national origin. An employer can include in its training examples of harassment based on one's perception of a person's national origin, one's association with an organization that promotes the interests of a national origin, and a person's perception of another person's association with a national origin. Also, it may want to consider using examples of proper and improper inquiries from management about an employee's immigration status.

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