

In Case You Missed It: California Adopted Comprehensive National Origin Regulations

Originally published in *The Authority*, California JPIA Newsletter Issue 81

Earlier this year, the California Fair Employment and Housing Council adopted new regulations regarding national origin, which went into effect on July 1, 2018. These regulations clarify the definition of "national origin," codify case law, and strengthen existing laws on discrimination, retaliation, and harassment. These laws apply to applicants and employees, regardless of documentation status.

2 Cal. Code Regs. §11027.1(a) expands the definition of "national origin" to include the individual's or the individual's 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.

The regulations also provide that "national origin groups" include "ethnic groups, geographic places of origin, and countries that are not presently in existence."

2 Cal. Code Regs. §11028 bolsters existing regulations that prevent harassment, discrimination, and retaliation based on national origin.

Language Restriction: California employers have been prohibited since 2001 from adopting or enforcing a policy that prohibits the use of any language in the workplace unless a business necessity justified the prohibition and certain notice requirements were met. The new

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regulations bolster this law by also requiring that any such restriction is "narrowly tailored." Under current law, restrictions on language use in the workplace are presumptively illegal unless the employer can show the following three things: (1) the language restriction is justified by a business necessity; (2) the restriction is narrowly tailored; and (3) the employer has informed the employees when the language restriction is to be enforced and the consequence of violating it. A language restriction that "merely promotes business convenience or is due to customer or co-worker preference" will not be permissible. Further, "English-only" rules are never allowed during employee's non-work time such as breaks, lunches, and unpaid employer-sponsored events.

Accents: Employers cannot discriminate against an applicant or employee based on his or her accent unless the employer can prove that the accent materially interferes with their ability to perform the job.

English Proficiency: Employers cannot discriminate against an applicant or employee based on his or her English proficiency unless it is justified by a business necessity. In determining whether there is a business necessity, the relevant factors include the type of proficiency, the degree of proficiency required, the nature of the job, and the job duties. However, an employer may request an applicant or employee provide information about his or her ability to speak, read, write, or understand any language, including English, if justified by a business necessity.

Immigration Status: This regulation applies to all applicants and employees regardless of immigration status. Further, this regulation prohibits inquiry into the applicant or employee's immigration status and discrimination based on immigration status unless there is clear and convincing evidence that the inquiry is necessary to comply with federal immigration law.

Human Trafficking: The regulations prohibit employers from using force, fraud, or coercion to compel employment based on national origin.

Height and/or Weight Requirements: If height or weight requirements create a disparate impact on the basis of national origin, the employer must be able to demonstrate that the requirements are job-related and justified by business necessity. Even if the employer is able to demonstrate that, the requirement may still be unlawful if the applicant or employee can prove that the purpose of the requirement can be achieved through less discriminatory means.

Recruitment and Job Segregation: Employers may not seek, request, or refer applicants or employees based on national origin, or assign positions, facilities or locations based on national origin.

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Harassment: Employers are prohibited from harassing an applicant or employee on the basis of national origin.

Retaliation: Employers are prohibited from retaliating against an individual who 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. This section specifically includes threatening to contact or actually contacting immigration authorities or a law enforcement agency about the immigration status of the individual, or a family member of that individual, and taking adverse employment action against an individual for updating personal information based on a change of name, social security number, or government-issued employment documents.

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