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Changes Ahead: Proposed EEOC Enforcement Guidance on National Origin Discrimination

**Presented by:
John J. Porta, Esq.
58 S. Service Road, Suite 250
Melville, N.Y. 11747
(631) 247-4650
John.Porta@jacksonlewis.com**

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Overview of Title VII & National Origin Discrimination

- Title VII protects job applicants and employees from employment discrimination based on their race, color, religion, sex and national origin, and opposition to practices made unlawful by Title VII.
- Title VII prohibits an employer from treating its employees unfavorably due to his or her national origin, which includes discrimination based on ethnicity, the appearance of an ethnic background, or the association with a particular country or part of the world.
- For example, discrimination against people with origins in the Middle East may be motivated by race (Arab), national origin (i.e. Jordan) or religion (Islam).

National Origin Discrimination

- Discrimination because an individual (or his or her ancestors) is from a certain place or has the physical, cultural, or linguistic characteristics of a particular national origin group.
- National origin can be real or perceived.
- Place of origin
 - Country (e.g., United States, Mexico, China, Syria)
 - Former country (e.g., Yugoslavia)
 - Geographic region never a country but closely associated with a particular national origin group (e.g., Kurdistan, Acadia)

National Origin Discrimination

- National origin group or ethnicity
 - Group of people who share a common language, culture, ancestry, race, and/or other social characteristics (e.g., Hispanics, Arabs, Roma)
- May be one of multiple protected bases
 - National origin can overlap with race, color, or religious discrimination
 - E.g., Charges filed by Asian American may involve allegations of discrimination motivated by physical traits (race) and ancestry (national origin)
 - E.g., Discrimination against people with origins in the Middle East may be motivated by race, national origin, or religion
- FY 2015: 9,438 (10.6%) charges filed with the EEOC alleging national origin discrimination

Proposed EEOC Enforcement Guidance

- Published on June 2, 2016.
- Available for public input until July 1, 2016.
- Intended to serve as a reference for EEOC staff investigating charges, lawyers bringing litigation, employers, and employees.
- Guidance sets forth EEOC's interpretation of the law.
- EEOC last comprehensively addressed national origin discrimination in 2002.
- In issuing Guidance, EEOC noted the continuing increasing percentages of immigrant workers in the U.S. – timely issue.

Proposed EEOC Enforcement Guidance

- As compared to EEOC's Compliance Manual Section on National Origin Discrimination (2002), Proposed Guidance:
 - Provides more concrete examples of national origin discrimination and updates its best practices.
 - Notes that discrimination based on an employee's *perceived* national origin is actionable.
 - States that human trafficking may violate Title VII in addition to violating criminal laws.
 - Addresses staffing firms in the joint employer context.
 - Provides that policy of screening out candidates who lack a SSN implicates Title VII if it has a disparate impact on work-authorized but newly arrived immigrants and new lawful permanent residents of a certain national origin.
 - Notes that threatening to report an employee's immigration status for participating in protected activity constitutes retaliation.
 - Discusses more fully language issues.

Promising Practices

- EEOC identified “promising practices” that employers should consider:
 - Use a variety of recruitment methods to attract a diverse pool of job seekers.
 - Establish written objective criteria for evaluating candidates for hire, promotion, or assignment; communicate the criteria; and apply them consistently.
 - Develop objective, job-related criteria for identifying unsatisfactory performance (e.g., implementing a progressive discipline policy).
 - Implement and distribute an anti-harassment policy.
 - When languages other than English are spoken in the workplace, ensure that policies are communicated effectively to all employees (e.g., translating the policies; offering training in languages spoken).

Homework Assignment

- Review pre-employment hiring practices including interview questions and background check policies to evaluate potential adverse impact.
- Consider translation of important workplace policies based upon primary language of employee population.
- Review any English-only workplace rules and conduct appropriate training.

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