



National Origin, Citizenship, and Immigration Status Discrimination

Who, What, Why . . .

Who does it apply to: Part of the protection comes from Title VII, which applies to employers with 15 or more employees. An overlapping part of the protection comes from the Immigration Reform and Control Act (IRCA), which applies to employers with four or more employees.

What is the issue: Title VII was passed in the 1960s to protect against discrimination based on race, color, religion, sex or national origin. The IRCA was passed to resolve a number of immigration-related issues but includes a provision that protects against employers discriminating in hiring or discharging an employee based on citizenship or immigration status (not including unauthorized aliens).

What am I required to do: Employers are required not to discriminate against employees on the basis of national origin. More specifically, employers are required not to treat an employee adversely with any consideration of his or her national origin, citizenship or immigration status in relationship to any significant aspect of employment.

What constitutes a violation: There are two kinds of violations – direct mistreatment and disparate impact. Direct mistreatment is straightforward. If an employer affirmatively mistreats an employee because of national origin, citizenship or immigration status by failing to hire or firing the employee, it can be actionable discrimination. Similarly, employers who demote or otherwise significantly slight an employee based on national origin may be liable for disparate treatment.

Disparate impact is more subtle. If an employer creates a policy that is neutral or non-discriminatory on its face, that policy might have a consequence of negatively impacting workers of one national origin more significantly than others. If an employer institutes a policy that employees must have clear English diction, the policy itself does not seem discriminatory because it may affect any worker. That said, certain national origins might be adversely affected because of their accent. This facially neutral rule has a disparate impact against workers of certain national origins and may create a claim.

What counts as a national origin, citizenship, or immigration status: The law goes way beyond what most employers would think:

- “national origin” includes birthplace, ancestry, culture, linguistic characteristics and accent.
- “citizenship” includes U.S. citizenship and citizenship of another nation for individuals legally in the country under U.S. law.
- “immigration status” includes any type of U.S. government-authorized visa or other work authorization that declares the intention to become a U.S. citizen.

What if my employee violates without consent: Choose carefully who you place in charge. Employees placed in positions of authority with the power to control the circumstances of other employees are not personally liable. Their liability is placed with the employer even if the employee acts without authority. The same is true of independent contractors (whether properly characterized or not) placed in positions of authority over employees.

What if national origin or citizenship is a requirement of the job: Sometimes an employer may require a person to have a certain national origin, citizenship or immigration status to obtain a position. An exception is made in the law for what are called Bona Fide Occupational Qualification’s (BFOQ). BFOQs are complicated, however. You should always check with your employment counsel before enacting a BFOQ.

Can retaliation play a part: Title VII and the IRCA protects employees who engage in protected activities such as supporting another employee’s claim of discrimination, resisting instruction to discriminate, and filing a complaint about discrimination with the employer or the appropriate governmental agency. Employers cannot negatively impact a significant aspect of employment for an employee who supports another’s national origin, citizenship or immigration status or their complaint against discrimination based on these characteristics. Employers also cannot retaliate against an employee for complaining of discrimination based on these characteristics or making a charge of discrimination with the appropriate governmental agency.

What about harassment: Even if an employer does not discriminate against an employee directly, the employer may be liable if its employees harass an employee about his or her national origin, citizenship or immigration status. The harassment must be significant enough to interfere with the employee's working conditions or ability to handle his or her job, but little harassing actions can add up to enough harassment to support a claim. An employer has a responsibility to be aware of what is going on with its employees and discipline employees for harassing conduct.

Common Situations:

Only English spoken here: USA Construction institutes a policy that all employees must speak English only, at all times. Is there a problem? Maybe. English only policies are subject to very strict scrutiny and are presumed invalid by the EEOC. Employers are better off making requirements that employees be capable of speaking English so that all staff can communicate in one language, but even these policies must be made for a demonstrable business reason. Advise employees of the requirement and explain the consequence of breaching this policy to all employees.

What was that you said: Borat accepted a position at Phonetics, Inc. Within the first week, however, problems arose. Borat, a recent immigrant from Kazakhstan, has a very, very thick accent and is hard for employees and customers to understand. His co-workers begin to ridicule him and the company lets him go. National origin claim? Yes and maybe. If Borat complained of the harassing ridicule, he may have a claim. If Phonetics, Inc. truly terminated Borat because no one can understand him, and it significantly impedes business with no way to adjust or fix it, there may be no claim on the termination.

Illegal failure to hire: Mike, an undocumented citizen of another country, applies for a job with Tourism Unlimited. He is qualified for the position but is not hired because he is an undocumented worker illegally in the US. Does he have a claim? Generally, undocumented workers who are not hired because of their undocumented status have no claim since it is illegal for businesses to hire them in the first place.

What Should I Do:

Good: Count up your workers every few months to know whether the law applies to you. Institute an anti-discrimination policy including national origin, citizenship or immigration status discrimination.

Better: In addition to developing a policy, control who is permitted to interview and make material decisions about employees to be sure they are aware of the concerns of these types of discrimination.

Best: In addition to the items above, create job descriptions for each position. Use the job descriptions to prepare advertisements for positions, to ask objective interview questions, and to create a uniform and objective performance review system to avoid accidentally discriminating against someone based on national origin, citizenship or immigration status.



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at mkelsheimer@grayreed.com or by phone at **469.320.6063**