

## Guidance on National Origin Discrimination in the Workplace Post-September 11th

According to the U.S. Census bureau, about one in ten Americans is foreign-born. That is why it is important for employers to increase their sensitivity to discrimination based on religion, national origin and ethnicity. In an effort to monitor backlash discrimination, the Equal Employment Opportunity Commission (EEOC) has been tracking charges alleging discrimination or retaliation related to the events of September 11, 2001, by individuals who are, or are perceived to be, Muslim, Arab, Afghani, Middle Eastern or South Asian. Alarming, between September 11, 2001 and September 10, 2002, the EEOC received 706 charges on the basis of Muslim religion, more than double the 323 charges received during the comparable period one year earlier.

### The Law

Title VII of the Civil Rights Act of 1964, which covers employers with fifteen or more employees, bans employment practices that foster national origin discrimination. The Act makes it illegal to discriminate because of a person's birthplace, ancestry, culture or language. This means people cannot be denied equal employment opportunity because they or their family are from another country, because they have a name or accent associated with a national origin group, because they participate in certain customs associated with a national origin group, or because they are married to or associate with people of a certain national origin. Title VII protects all workers in the United States, whether born in the United States or abroad and regardless of citizenship status.

### New Guidelines

The EEOC enforces the federal prohibition against national origin discrimination in employment under Title VII and has recently issued new guidelines in their National Origin Discrimination Compliance Manual. The manual explains the prohibition against national origin bias and emphasizes best practices aimed at fostering work environments that are free of such discrimination. The commission addresses a wide range of issues that arise in claims of national origin discrimination, including hiring decisions, harassment, and language issues.

Some key points discussed in the EEOC's Compliance Manual:

- An employer may enforce a dress code; however, if the dress code conflicts with the religious practices of an employee, the employer must modify the dress code unless doing so would cause the

employer undue hardship. A minor financial or administrative burden on the employer is not considered undue hardship.

- An employment decision based on foreign accent is not illegal if an individual's accent materially interferes with communication skills necessary to perform job duties.
- Title VII permits employers to adopt English-only rules if they are adopted for nondiscriminatory reason and are justified by business necessity such as for safety or efficiency reasons.
- A "U.S. citizen only" hiring policy is illegal--the Immigration Reform Control Act of 1986 (IRCA) makes it illegal for employers with four or more employees to make U.S. citizenship a requirement for employment.

### Best Practices

The EEOC suggests the following best practices for promoting non-discriminatory treatment in the workplace:

- Establish written objective criteria for evaluating candidates for hire or promotion and apply those criteria consistently to all candidates.
- Ask the same questions of all job applicants and inquire only about matters that relate to the position in question.
- Formulate clearly defined criteria for employment decisions. Appropriate objective criteria for employment decisions should be tied to business needs since criteria that are not business-related sometimes improperly screen out individuals based on national origin.
- Decisions to discharge or lay off employees must be based on nondiscriminatory reasons, such as seniority, or quality or quantity of work, rather than national origin, religion, or other prohibited factors.
- Develop and apply clear objective criteria for discipline, demotion, and discharge decisions such as a progressive discipline policy directed at correcting employee misconduct.
- Monitor the actions of inexperienced managers and encourage them to consult with more experienced managers when addressing difficult issues.

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## Harassment-free Workplace

Along with discrimination, Title VII also prohibits harassment on the basis of national origin. According to the EEOC, harassment is one of the most common claims raised in national origin charges filed with the Commission. Employers have a responsibility to maintain a workplace free of national origin harassment.

The EEOC describes unlawful harassment as follows:

*National origin harassment violates Title VII when it is so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive. Harassment based on national origin can take many different forms including ethnic slurs, workplace graffiti, or other offensive conduct directed towards an individual's birthplace, ethnicity, culture, or foreign accent. A hostile environment may be created by the actions of supervisors, coworkers, or even non-employees, such as customers or business partners.*

## Minimizing Liability

The U.S. Supreme Court has established the following standards for employer liability for national origin harassment. (1) An employer will be held liable for unlawful harassment by a supervisor unless it can show that the employer exercised reasonable care to prevent and correct promptly any harassing behavior and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. (2) An employer is liable for unlawful national origin harassment by coworkers or non-employees if the employer knew or should have known about the harassment and failed to take immediate and appropriate corrective action.

The EEOC suggests three important measures employers can take to prevent harassment and minimize employer liability:

- Clearly communicate to employees that national origin discrimination will not be tolerated and violators will be disciplined.
- Clearly communicate to employees the policies and procedures for addressing complaints of national origin harassment.
- Train managers on how to identify and respond effectively to harassment.

You should immediately investigate and resolve all complaints of discrimination made by employees. Also, it is important to note that you may not retaliate against a worker who makes a discrimination complaint. Title VII prohibits retaliation against an individual because he or she has opposed unlawful national origin discrimination or participated in the complaint process by filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Title VII.

## Encourage Diversity and Tolerance

Businesses benefit from a diverse workforce. The best way to prevent national origin discrimination claims and minimize your liability for such claims is to utilize neutral hiring practices and actively encourage workplace diversity and tolerance. Now is a good time to review your firm's written policies and procedures and make sure they address national origin discrimination and harassment. The complete EEOC National Origin Discrimination Compliance Manual as well as charge statistics and links to documents and resources that provide further information on the topic can be found at <http://www.eeoc.gov/origin/index.html>

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## Department of Labor Develops Interactive Web Site



The Department of Labor (DOL) has developed an interactive web site that provides employers with information on a variety of topics that the agency regulates. The site is located at <http://www.dol.gov/elaws/>. The site contains interactive advisors that help employers and employees understand their rights and responsibilities under the employment laws and regulations administered by the DOL such as the Family and Medical Leave Act and the Uniformed Services Employment and Reemployment Rights Act. Each advisor simulates the interaction a user might have with a DOL employment law expert by asking questions and providing answers based on the user's responses.

## Help is Just A Telephone Call Away

For immediate legal advice on employment law and practice management issues such as national origin discrimination, employee complaint procedures, and employee evaluations call **800-569-3679**. As a CPA EmployerGard policyholder, your firm is entitled to 30 minutes of legal advice per month, at no additional charge, from experienced attorneys at the national employment and labor law firm of Ford & Harrison LLP. Please have your CPA EmployerGard policy number handy.

# Evaluating Your Employees

Employees don't like to be evaluated and managers hate to do it, so why bother? Some employers don't bother and later find this to be a costly mistake.

Most people assume they are doing a good job unless told otherwise. Employees expect regular promotions and raises because, in their opinion, they are doing a good job and deserve to be rewarded. If the employer fails to give the promotion or raise or, worse yet, fires someone who has not been warned of substandard performance, the employee will probably feel he or she was unfairly treated. The employee who feels mistreated is likely to sue.

Good evaluations begin with good standards. Employees should be evaluated against a written standard that is given to them at the beginning of the rating period. The standard should focus on the essential elements of the position, the employee's technical competence, any performance goals met or missed, and the employee's ability to work with others and take direction. Give the employee the opportunity to provide feedback on issues such as whether the employee met his or her own goals and what suggestions the employee has for improving performance. Use different evaluation forms for different positions, such as hourly workers, staff accountants, CPAs, managers and partners.

Use the performance evaluation as a development tool – recognize good employees for their achievements. Establish a plan for the employee to achieve management status, if he or she has that potential. Identify objectives to be achieved by the next performance evaluation and obtain the employee's input on these objectives.

Consider having an initial performance review after a 90-day introductory period. The employee's suitability for the position is usually apparent within this time period. Do not keep employees who fail to meet standards – performance is unlikely to improve. Also, do not promise or even suggest that satisfactory completion of the introductory period is a guarantee of future employment.

Performance evaluations should cover the entire rating period and should describe what the employee has and has not accomplished throughout the period. Train managers who conduct evaluations on

how to avoid conclusory opinions that are not supported by facts.

Be honest about the employee's strengths and weaknesses and don't give higher ratings to an employee in a protected class to avoid claims of discrimination. It is discriminatory to evaluate employees differently based on race, gender, religion, disability, or any other protected category regardless of whether the evaluation seems too high or too low.

Factual and fair performance evaluations are invaluable when defending against claims of discrimination. An employee who has been given written warning of performance deficiencies cannot later claim to be unaware of the performance issues that resulted in discharge. Failure to document disciplinary problems, on the evaluation or at other times, leaves management open to employee claims of discrimination and retaliation. Few employees will admit receiving oral warnings and jurors, who tend to sympathize with employees, will often give oral admonitions little credence. Written documentation of performance problems, for which the employee acknowledged receipt, will provide powerful evidence that the employee was given fair notice of what was expected and counseled about the need to improve.

The purpose of performance evaluations is to let employees know what is expected and then measure their performance according to those expectations. Evaluations should be used to commend and reward good employees and correct the performance of those whose achievements are substandard. Management should consider performance appraisals as valuable tools in the efficient operation of the business. Supervisors should be trained to perform appraisals fairly and accurately. Employees should know that management takes the appraisals seriously and that any deficiencies must be corrected or disciplinary action will be taken. If prepared and used properly, performance appraisals can boost employee morale and performance and provide a sound basis for corrective action against underachieving employees.

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## Test Your Knowledge

### True or False?

1. Developing and educating employees on antiharassment policies and procedures can establish part of an employer's affirmative defense to a harassment complaint.
2. Pre-employment background investigations may be subject to the notice requirements of the Fair Credit Reporting Act.
3. An employer will not be liable for sexual harassment committed by managers or supervisors as long as it is not aware of the conduct.
4. Employers hiring female applicants with children should ascertain if adequate child-care arrangements have been made.
5. An employer can discharge an employee who is HIV-positive if the employee's co-workers do not want to work with that person.
6. Part-time employees are not counted in determining Family and Medical Leave Act coverage.
7. The Pregnancy Discrimination Act requires employers to give employees pregnancy leave.
8. If an employee making a harassment complaint cannot identify any witnesses to the harassment and the person accused denies the conduct, the employer does not need to take any action in response to the complaint.
9. If an employee does not immediately complain about offensive behavior, the behavior is probably welcome and not harassment.
10. Managers and supervisors can never be personally sued for sexual harassment.

# Developing an Effective Harassment Complaint Procedure

The U.S. Supreme Court's 1998 decisions in *Faragher* and *Ellerth*\* provided guidance on how employers can protect themselves against certain types of harassment suits brought under Title VII. The concept of reasonableness is essential to the affirmative defense set forth in these cases—the employer's reasonableness in taking care to prevent or correct any workplace harassment and the employee's unreasonableness in failing to take advantage of opportunities offered by the employer to remedy the harassment. The employer's harassment policy and procedures for reporting harassment claims are critical in resolving questions of reasonableness.

A recurring issue with harassment reporting procedures is whether an employer is deemed to have notice of a harassment complaint if the employee lodges the complaint with someone other than the person designated in the harassment policy to receive complaints. For example, if the firm's policy requires employees to report harassment to a specific person, is the firm considered to be on notice if the employee instead reports the harassment to an immediate supervisor? The answer to this question depends on whether the firm had a "reasonable and effective complaint procedure" in place and whether the employee's reporting was an "unreasonable" failure to take advantage of this procedure.

The following suggestions should help you develop reasonable and effective complaint procedures.

- (1) Designate by name and title a specific management employee as the person to whom employees should report instances of harassment.
- (2) Communicate the designee's contact information – address, telephone number, and e-mail address – to all employees.
- (3) Designate an alternate person or people to whom complaints can be reported if the primary person is unavailable.
- (4) Ensure that the people identified to receive complaints are accessible to employees on a regular basis.
- (5) Ensure that the complaint procedure is communicated to all employees. Cover the harassment policy and reporting procedure in

employee orientation materials and post the policy on bulletin boards in employee work areas.

- (6) Have each employee sign a written statement acknowledging that he or she has received and understands the harassment policy and complaint procedure.
- (7) Review the harassment policy and complaint procedure with employees on a regular basis and obtain written acknowledgement of the reviews.
- (8) Reissue the complaint procedure whenever the designated complaint recipients are changed and obtain a written acknowledgement that employees have received the revised procedure.
- (9) Maintain all acknowledgements in the employees' personnel files.

All managers, even those not designated to receive harassment complaints, should be trained on how to recognize illegal harassment in the workplace and to report any harassment complaints to the appropriate person for investigation. No harassment complaint should ever be ignored. An employer may be held liable in a harassment suit if its management knew or should have known of the harassment.

An effective complaint procedure is only part of a complete harassment policy. You should consult experienced labor and employment counsel to develop an effective harassment policy and complaint procedure that is appropriate for your specific workplace.

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\* For more information on the *Faragher* and *Ellerth* decisions referenced above, refer to *Employer Liability for Unlawful Harassment by Supervisors in the Summer 2001 EmployerGardian* available at <http://www.cpai.com/pdfs/summer2001.pdf>

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