The U.S. Equal Employment Opportunity Commission

EEOC	DIRECTIVES TRANSMITTAL	Number 915.003
		December 2, 2002

SUBJECT: EEOC COMPLIANCE MANUAL

PURPOSE: This transmittal covers the issuance of Section 13 of the new Compliance Manual on "National Origin Discrimination." The section provides guidance and instructions for investigating and analyzing charges alleging discrimination based on national origin.

EFFECTIVE

DATE: Upon receipt

DISTRIBUTION: EEOC Compliance Manual holders

OBSOLETE

DATA: This section of the new Compliance Manual supersedes the following: Section 622: *Citizenship, Residency Requirements, Aliens and Undocumented Workers*, EEOC Compliance Manual, Volume II; and Section 623: *Speak-English-Only Rules and Other Language Policies*, EEOC Compliance Manual, Volume II.

_____/s/_____
Cari M. Dominguez
Chair

SECTION 13: NATIONAL ORIGIN DISCRIMINATION(1)

TABLE OF CONTENTS

I. Overview

II. What Is "National Origin" Discrimination?

A. Employment Discrimination Based on Place of Origin

B. Employment Discrimination Against a National Origin Group

C. Related Forms of Discrimination Prohibited by Title VII

III. Employment Decisions

A. Recruitment

1. Application of Title VII to Recruitment

2. Best Practices

B. Hiring, Promotion, and Assignment

1. Application of Title VII to Hiring, Promotion, and Assignment

2. Best Practices

C. Discipline, Demotion, and Discharge

1. Application of Title VII to Discipline, Demotion, and Discharge

2. Best Practices

IV. Harassment

A. Title VII's Prohibition Against National Origin Harassment

B. Liability

V. Language Issues

A. Accent Discrimination

B. Fluency Requirements

1. English Fluency

2. Foreign Language Fluency

C. English-Only Rules

1. Application of Title VII to English-Only Rules

2. Best Practices

VI. Citizenship-Related Issues

A. Citizenship Requirements

B. Coverage of Foreign Nationals

VII. Related Issues

A. Retaliation

B. Foreign Employers in the United States and American Employers Overseas

1. Foreign Employers

2. American Employers Overseas

Appendix A: How to File a Charge

Appendix B: When a Charge Is Filed Against Your Company

13-I OVERVIEW

Title VII of the Civil Rights Act of 1964 protects workers from employment discrimination based on their race, color, religion, sex, national origin, opposition to practices made unlawful by Title VII, or participation in Title VII proceedings.[2] This Section of the Compliance Manual focuses on the prohibition against national origin discrimination. In enacting this prohibition, Congress recognized that whether an individual's ancestry is Mexican, Ukrainian, Filipino, Arab, American Indian, or any other nationality, he or she is entitled to the same employment opportunities as anyone else. Likewise, Title VII's protections extend to all workers in the United States, whether born in the United States or abroad and regardless of citizenship status. Title VII articulates the national policy against national origin discrimination in the workplace, while also preserving an employer's freedom of choice to make sound business decisions.[3]

As the composition of the American workforce continues to change, Title VII's prohibition against national origin discrimination has become increasingly significant in ensuring equality in employment opportunities. Today, about one in ten Americans is foreign-born.[4] The largest numbers of recent immigrants have come from Asia, including China, India, and Vietnam, and from Latin America, including Mexico, El Salvador, and Cuba.[5] Between 1990 and 2000, the proportion of the U.S. population of Asian origin increased substantially.[6] The proportion of Hispanics also rose substantially, and now one in eight Americans is Hispanic.[7] Immigration also has expanded diversity among Black Americans, including new immigrants from the Caribbean and sub-Saharan Africa. Since 1980, the proportion of Black Americans who are foreign-born has risen by about 65 percent.[8]

The American workforce has witnessed a corresponding increase in diversity. In 1999, immigrant

workers numbered 15.7 million, accounting for 12 percent of U.S. workers.[9] Between 1990 and 1998, 12.7 million new jobs were created in the United States, and 38 percent (5.1 million) were filled by immigrants.[10] In 2000, Hispanics, Asians, and American Indians constituted 15.2 percent of the workforce employed by private employers with 100 or more employees.[11]

Many successful businesses have benefitted from a diverse labor force. As noted in the Commission's report on the "Best Practices of Private Sector Employers," employers benefit from a diverse work force by being able to "draw talent and ideas from all segments of the population" and may gain a "competitive advantage in the increasingly global economy."[12] In its report "Good for America," the Glass Ceiling Commission noted that, as the workplace increasingly reflects the pluralism of American society, employers are realizing that "harmony - and therefore the efficiency and effectiveness - of the workplace requires greater sensitivity to cultural differences."[13]

This Section is intended to be a practical resource on Title VII's prohibition against national origin discrimination. It defines "national origin" discrimination and discusses typical employment situations in which national origin discrimination may arise. This Section also is intended to fulfill the more specific needs of employees, employers, and EEOC staff engaged in mediation and enforcement. For example, it addresses steps an employer can take to prevent national origin discrimination and provides guidance for EEOC staff handling charges of national origin discrimination.[14] It also encourages employers to adopt "best practices," proactive measures that not only comply with Title VII but also address impediments to equal employment opportunity.[15]

13-II WHAT IS "NATIONAL ORIGIN" DISCRIMINATION?

Generally, national origin discrimination means treating someone less favorably because that individual (or his or her ancestors) is from a certain place or belongs to a particular national origin group.[16] Title VII prohibits employer actions that have the purpose or effect of discriminating against persons because of their national origin. In addition, Title VII prohibits discrimination against a person because he or she is associated with an individual of a particular national origin.[17]

A. Employment Discrimination Based on Place of Origin

National origin discrimination includes discrimination because a person (or his or her ancestors) comes from a particular place. The place is usually a country or a former country, for example, Colombia or Serbia. In some cases, the place has never been a country, but is closely associated with a group of people who share a common language, culture, ancestry, and/or other similar social characteristics, for example, Kurdistan.

B. Employment Discrimination Against a National Origin Group

A "national origin group," often referred to as an "ethnic group," is a group of people sharing a common language, culture, ancestry, and/or other similar social characteristics.[18] Title VII prohibits employment discrimination against any national origin group, including larger ethnic groups, such as Hispanics and Arabs, and smaller ethnic groups, such as Kurds or Roma (Gypsies).[19] National origin discrimination includes discrimination against American Indians or members of a particular tribe.[20]

Employment discrimination against a national origin group includes discrimination based on:

- **Ethnicity:** Employment discrimination against members of an ethnic group, for example, discrimination against someone because he is Arab. National origin discrimination also includes discrimination against anyone who does *not* belong to a particular ethnic group, for example, less

favorable treatment of anyone who is not Hispanic.

- **Physical, linguistic, or cultural traits:** Employment discrimination against an individual because she has physical, linguistic, and/or cultural characteristics closely associated with a national origin group, for example, discrimination against someone based on her traditional African style of dress.[21]
- **Perception:** Employment discrimination against an individual based on the employer's belief that he is a member of a particular national origin group, for example, discrimination against someone perceived as being Arab based on his speech, mannerisms, and appearance, regardless of how he identifies himself or whether he is, in fact, of Arab ethnicity.

C. Related Forms of Discrimination Prohibited by Title VII

Title VII's prohibition against national origin discrimination often overlaps with the statute's prohibitions against discrimination based on race or religion. The same set of facts may state a claim of national origin discrimination and religious discrimination when a particular religion is strongly associated, or perceived to be associated, with a specific national origin.[22] Similarly, discrimination based on physical traits or ancestry may be both national origin and racial discrimination. If a claim presents overlapping bases of discrimination prohibited by Title VII, each of the pertinent bases should be asserted in the charge.

EXAMPLE 1
NATIONAL ORIGIN AND RELIGIOUS DISCRIMINATION

Thomas, who is Egyptian, alleges that he has been harassed by his coworkers about his Arab ethnicity. He also has been subjected to derogatory comments about Islam even though he has told his coworkers that he is Christian. Thomas' charge should assert both national origin and religious discrimination.

EXAMPLE 2
NATIONAL ORIGIN AND RACE DISCRIMINATION

Toni alleges that she was not hired for a server position in a Greek restaurant based on her Chinese ethnicity and physical features. Toni's charge should assert both national origin and race discrimination.

A significant difference between Title VII's coverage of national origin and religion relates to accommodation. Title VII only requires accommodation of *religious* practices. Pursuant to this requirement, an employer must modify workplace policies that conflict with religious practices unless doing so would result in an undue hardship to the operation of the employer's business. For example, an employer would be required to provide an exception to a dress code to accommodate an employee's religious attire unless doing so would result in undue hardship. If the modification imposed only a minor financial or administrative burden on the employer, it would not impose an undue hardship.

While accommodation requirements do not apply to national origin, Title VII prohibits employers from imposing more restrictive workplace policies on some national origin (or religious) groups than on others. For example, an employer may not require that Hispanic workers wear business attire while permitting non-Hispanic workers in similar positions to wear more casual attire. However, an employer could impose the same dress code on all workers in similar jobs, regardless of their national origin, as

long as the policy was not adopted for discriminatory reasons and is enforced evenhandedly.[23]

13-III EMPLOYMENT DECISIONS

Title VII prohibits employers from basing employment decisions on an individual's national origin. Any discriminatory employment decision is covered by Title VII, including:[24]

- Recruitment
- Hiring
- Promotion
- Transfer
- Wages and benefits
- Work assignments
- Leave
- Training and apprenticeship programs
- Discipline
- Layoff and termination

The following subsections discuss the application of Title VII's bar on national origin discrimination to various types of employment decisions.

A. Recruitment

1. Application of Title VII to Recruitment

Title VII prohibits employers from engaging in recruitment practices that discriminate on the basis of national origin. Thus, an employer may not recruit individuals belonging to some national origin groups while deliberately not recruiting members of other national origin groups. Nor may an employer adopt certain recruitment practices, such as word-of-mouth recruitment, where such practices have the purpose or effect of discriminating against particular national origin groups.

Because employment agencies are covered by Title VII, they may not comply with requests from employers to engage in discriminatory recruitment or referral practices. Thus, a placement agency may not honor a client request to exclude Arab or South Asian applicants. Recruiters also may not independently screen out job seekers or applicants on the basis of national origin, religion, or any other characteristic covered by Title VII.

Finally, coverage of Title VII also applies to temporary agencies with respect to referrals and treatment of employees on the job. For instance, if a temporary agency learns that one of its employees was involuntarily transferred by a client from a position that involves public contact to a lower-paying position because of perceptions about her national origin, the agency should insist that the client return the employee to the former position. If the client refuses, the agency should offer to assign the worker to another client at the same rate of pay, and decline to assign other employees to the same worksite unless the client changes its discriminatory practices. A temporary agency that fails to take reasonable steps to remedy discrimination by a client may be jointly liable for any discriminatory actions taken against the agency's employees while assigned to the client.[25]

2. Best Practices

A common employer practice is to use a variety of recruitment and hiring techniques, some of which are low cost, including job fairs and open houses, professional associations, search firms, and internships and scholar programs. This approach casts a wide net for talent and is more likely to result in a diverse pool of job seekers.[26] Specialized publications or websites, including those directed to particular communities, may be effective tools for these purposes. Some recruitment methods, such as word-of-mouth hiring, are less likely to reach a diverse pool of job seekers and may tend to reinforce the make-up of the existing work force to the exclusion of other qualified individuals.

Employment advertisements should notify prospective applicants of all qualifications, including any qualifications related to language ability. For example, employment advertisements for positions where English skills are required by business necessity should specify such requirements.[27] Advertisements should state that the employer is an "equal opportunity employer."

B. Hiring, Promotion, and Assignment

1. Application of Title VII to Hiring, Promotion, and Assignment

Title VII prohibits hiring, promotion, and assignment decisions that are based on national origin.

EXAMPLE 3
UNLAWFUL HIRING DECISION

Anu is a woman of Bangladeshi ancestry who wears a sari. She is offered a position at XYZ Bakery after a phone interview. When she reports for the first day of work, she is told by the manager who interviewed her that the bakery has found someone "better suited" for the position. Anu files an EEOC charge alleging discrimination based on national origin. She believes that the bakery's manager changed his mind about hiring her after meeting her in person and seeing that she is South Asian. The EEOC investigation reveals that the bakery hired an Hispanic woman for the position one week after turning Anu away and that Anu and the selectee possessed comparable qualifications. Under the circumstances, the evidence establishes that the employer has provided a false reason for its action as a pretext for unlawful discrimination.

Customer Preference

In addition, employers may not rely on coworker, customer, or client discomfort or preference as the basis for a discriminatory action. If an employer takes an action based on the discriminatory preferences of others, the employer is also discriminating.

EXAMPLE 4
EMPLOYMENT DECISION BASED ON CUSTOMER PREFERENCE

Alexi, a Serbian-American college student, applies to work as a cashier at a suburban XYZ Discount store. Although Alexi speaks fluent English, the manager who conducts the routine interview comments about his name and noticeable accent, observing that XYZ's customers prize its

"all-American image." Alexi is not hired. XYZ has subjected Alexi to unlawful national origin discrimination if it based the hiring decision on assumptions that customers would have negative perceptions about Alexi's ethnicity.

Assignment

Employers may not assign applicants or employees to certain positions based on national origin.[28]

EXAMPLE 5
UNLAWFUL ASSIGNMENT BASED ON NATIONAL ORIGIN

XYZ Pizza Palace decides to open a restaurant at a suburban shopping mall. It runs an advertisement in local newspapers recruiting for positions in food preparation, serving, and cleaning. Carlos, an Hispanic man with a few years of experience as a server at other restaurants, applies for a position with XYZ and states a preference for a server position. Believing that Hispanic employees would be better suited for positions with limited public contact at this location, XYZ offers Carlos a position in cleaning or food preparation even though he is as well qualified for a server position as many non-Hispanic servers employed by XYZ. Under the circumstances, XYZ has unlawfully assigned Carlos to a position based on his national origin.

Similarly, employers may not limit promotional opportunities based on national origin.

EXAMPLE 6
UNLAWFUL LIMITATION OF PROMOTIONAL OPPORTUNITIES BASED ON NATIONAL ORIGIN

Raj, who is Indian, is a computer programmer for XYZ Information Technology Consultants. Raj applies for a slot in XYZ's management development program and is rejected. Raj files an EEOC charge alleging that the rejection was based on his national origin. The employer states that Raj was not selected because he was not as qualified as other applicants. The investigation reveals that, based on XYZ's written criteria, Raj had superior qualifications to three non-Indian candidates selected for the program. The investigation also reveals that since XYZ initiated the management program, only one out of the fifteen candidates selected for the program has been South Asian, even though nearly one-third of the applicants and nearly one-half of the programming staff are South Asian. The evidence establishes that XYZ unlawfully rejected Raj for its management program based on his national origin.

Mixed-Motives Cases

Employment decisions that are motivated by *both* national origin discrimination and legitimate business reasons violate Title VII. However, remedies in such "mixed-motives" cases are limited if the employer

would have taken the same action even if it had not relied on national origin. The charging party may receive injunctive relief and attorney's fees but is not entitled to reinstatement, back pay, or compensatory or punitive damages.[29]

EXAMPLE 7
MIXED MOTIVES: LIMITATIONS ON REMEDIES

Jane, a Chinese-American, was hired to fill a temporary position as an assistant professor of philosophy at a major private university. Several years later, she was rejected for a permanent position in the Philosophy Department. A colleague tells Jane that at the board meeting at which the permanent position and the relative qualifications of the candidates were discussed, the Department Chair, one of the five people on the hiring committee for the position, stated, "I don't care how brilliant she is - one Asian in the Department is enough." Jane files an EEOC charge alleging national origin discrimination based on this evidence.

The EEOC investigation reveals that the Department Chair did, in fact, make the reported statement and that the other hiring committee members generally defer to his hiring recommendations. The investigation also reveals that Jane was less qualified than the selectee. The selectee had numerous well-received publications and lectures recently, but Jane had only published one academic article in three years and had not spoken at conferences in her field. Because the evidence establishes that the university would have made the same decision even absent discrimination, Jane is entitled to injunctive relief and attorney's fees, but not instatement, back pay, or compensatory or punitive damages.

Security Requirements

In some circumstances, employers may justify hiring and other selection decisions by relying on security requirements. Title VII permits refusal to hire, refusal to refer, or termination, where an individual does not meet job requirements that are imposed in the interest of national security under any security program in effect pursuant to federal statute or Executive Order.[30] Additionally, the Commission may not review the substance of a security clearance determination or the security requirement, even if it is allegedly based on national origin. Accordingly, EEOC review of employment decisions involving security clearances is very limited. However, the Commission can review whether procedural requirements in making security clearance determinations were followed without regard to an individual's protected status.[31] For instance, an employer may not deny procedural safeguards when revoking the security clearances of Cuban-American employees that it grants to other employees.

An employer also may adopt other security requirements for its employees or applicants. Such requirements must be adopted for nondiscriminatory reasons and applied in a nondiscriminatory manner. For instance, an employer may require applicants of Middle Eastern descent to undergo only the same background investigation as applicants of other national origin groups. In addition, employers do not violate Title VII by cooperating with requests by law enforcement officers for access to employee personnel files.[32]

2. Best Practices

Employers can reduce the risk of discriminatory employment decisions by establishing written objective

criteria for evaluating candidates for hire or promotion and applying those criteria consistently to all candidates. Likewise, in conducting job interviews, employers can promote nondiscriminatory treatment by asking the same questions of all applicants and inquiring about matters related to the position in question. If an employer has clearly defined criteria for employment decisions, managers can be more confident that they are selecting the most qualified candidates.[33] Appropriate objective criteria for employment decisions will be tied to business needs. Criteria that are not business-related sometimes improperly screen out individuals based on national origin.

EXAMPLE 8
REMOVING A JOB REQUIREMENT THAT MAY IMPROPERLY SCREEN OUT INDIVIDUALS BASED ON NATIONAL ORIGIN

For many years, XYZ Tool Corporation has had an apprenticeship program that trains participants in the skills needed to become a journeyman machine mechanic. XYZ started as a family-owned business and has limited the program to individuals who are sponsored by current machine mechanics. In the course of negotiating a new collective bargaining agreement with the local union, XYZ and the union note that the number of applicants to the program has declined steadily for the last ten years and that, while there has been an increase in Filipino and Hispanic workers in the local labor force, there are none in the apprenticeship program. XYZ and the union agree to discontinue the personal sponsorship requirement because it screens out people on the basis of national origin and it is not related to the requirements of the mechanic position.

C. Discipline, Demotion, and Discharge

1. Application of Title VII to Discipline, Demotion, and Discharge

As with other employment decisions, discipline, demotion, and discharge decisions may not be based on national origin.

EXAMPLE 9
UNLAWFUL DISCHARGE BASED ON NATIONAL ORIGIN

Ahmed, who is Lebanese, was discharged from his position as a city bus driver. According to the employer, Ahmed was discharged because, while his performance was satisfactory, customers complained that they were wary of riding with an obviously Middle Eastern driver after the recent arrest of several suspected terrorists in the same city. The employer has unlawfully discharged Ahmed based on his national origin.

Discipline, demotion, and discharge decisions are typically based on either employee misconduct or unsatisfactory work performance. While neutral rules and policies regarding discipline, demotion, and discharge generally do not violate Title VII, they must be enforced in an evenhanded manner, without regard to national origin.

EXAMPLE 10
DISCRIMINATORY ENFORCEMENT OF TARDINESS POLICY

XYZ Foods, a grocery store, has a written policy of docking workers' pay for being late. Stephanie, a Somali employee, was docked pay as a penalty for being 15 minutes late on two occasions. While other Somali workers have also been docked pay for being late, Hmong workers have been given warnings or permitted to make up the time for comparable violations. Because XYZ treats Somali employees who violate its tardiness policy more severely than Hmong employees who violate it, the company has discriminated against Stephanie based on her national origin.

Employer 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.

EXAMPLE 11
UNLAWFUL LAYOFF

Bob, who is Jamaican, was laid off from his position as an accountant with XYZ Medical Supply Co. Bob asks the employer why he was laid off while others were retained and is told that his performance was inferior to that of other accountants. Bob suspects that the employer's reason is a pretext for national origin discrimination and files an EEOC charge. The investigation reveals that XYZ generally relies on seniority in making layoff decisions among employees with satisfactory performance and only relies on other factors, like comparative performance, when employees have comparable levels of seniority. Bob had three years more seniority than Phil and Susan, two non-Jamaican accountants who were not laid off. Bob, Phil, and Susan all received performance evaluations from the same supervisor commending them for "excellent" performance, and all received year-end bonuses.

Under the circumstances, the evidence establishes that XYZ has provided a false reason - performance - for laying off Bob. Bob had the same "excellent" performance as two other accountants, and XYZ failed to follow its normal layoff policy. Therefore, the evidence establishes that Bob was laid off because of his national origin in violation of Title VII.

2. Best Practices

Employers can best treat employees of different national origin groups in a nondiscriminatory manner by developing and applying clear objective criteria for discipline, demotion, and discharge decisions. These policies should address issues related to employee misconduct and unsatisfactory work performance. One common approach for addressing misconduct is a progressive discipline policy directed at correcting employee misconduct.

Employers also will benefit from carefully recording the business reasons for disciplinary or performance-related actions and sharing these reasons with the affected employees. In appropriate

circumstances, employers also may choose alternative approaches, such as an employee assistance program. Because any policy related to discipline or poor work performance will require some exercise of managerial discretion, employers also may wish to monitor the actions of inexperienced managers and encourage them to consult with more experienced managers when addressing difficult issues.[34]

13-IV HARASSMENT

Harassment is one of the most common claims raised in national origin charges filed with the EEOC. During the last decade, the number of private sector national origin harassment charges filed with the EEOC increased from 1,383 charges in fiscal year 1993 to 2,719 charges in fiscal year 2002. In fiscal year 2002, thirty percent of all private sector national origin charges included a harassment claim. The subsections below discuss Title VII's prohibition against national origin harassment, offer practical guidance on how employers can prevent unlawful harassment, and outline steps that employees should take when they believe that they have been harassed.

A. Title VII 's Prohibition Against National Origin Harassment

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.[35] 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 nonemployees, such as customers or business partners. Relevant factors in evaluating whether national origin harassment rises to the level of creating a hostile work environment may include any of the following:

- Whether the conduct was physically threatening or intimidating;
- How frequently the conduct was repeated;
- Whether the conduct was hostile and/or patently offensive;
- The context in which the harassment occurred; and
- Whether management responded appropriately when it learned of the harassment.[36]

The following example illustrates the distinction between "merely offensive" and unlawful conduct.

EXAMPLE 12
OFFENSIVE CONDUCT BASED ON NATIONAL ORIGIN THAT VIOLATES TITLE VII

Muhammad, an Arab-American, works for XYZ Motors, a large automobile dealership. His coworkers regularly call him names like "camel jockey," "the local terrorist," and "the ayatollah," and intentionally embarrass him in front of customers by claiming that he is incompetent. Muhammad reports this conduct to higher management, but XYZ does not respond. The constant ridicule has made it difficult for Muhammad to do his job. The frequent, severe, and offensive conduct linked to Muhammad's national origin has created a hostile work environment in violation of Title VII.[37]

In contrast, the example below illustrates circumstances in which conduct that may be offensive is not

sufficiently severe or pervasive to create a hostile work environment.

EXAMPLE 13
OFFENSIVE CONDUCT BASED ON NATIONAL ORIGIN THAT DOES NOT VIOLATE TITLE VII

Henry, a Romanian emigrant, was hired by XYZ Shipping as a dockworker. On his first day, Henry dropped a carton, prompting Bill, the foreman, to yell at him. The same day, Henry overheard Bill telling a coworker that foreigners were stealing jobs from Americans. Two months later, Bill confronted Henry about an argument with a coworker, called him a "lazy jerk," and mocked his accent. Although Bill's conduct was offensive, it was not sufficiently severe or pervasive for the work environment to be reasonably considered sufficiently hostile or abusive to violate Title VII.

B. Liability

Employers and employees each play an essential role in preventing national origin harassment. Failure by an employer to take appropriate steps to prevent or correct harassment may contribute to employer liability for unlawful harassment. Likewise, failure by an employee to take reasonable steps to report harassment may preclude the employee from being able to hold an employer responsible for the harassment. When employers and employees both take appropriate steps to prevent and correct national origin harassment, offensive conduct generally will be corrected before escalating to the point of violating Title VII.

Generally, an employer will be liable for unlawful harassment by a supervisor *unless* it can show the following:

- 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 or to avoid harm otherwise.[38]

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.[39]

The most important step for an employer in preventing harassment is clearly communicating to employees that harassment based on national origin will not be tolerated and that employees who violate the prohibition against harassment will be disciplined. In addition, an employer should have effective and clearly communicated policies and procedures for addressing complaints of national origin harassment and should train managers on how to identify and respond effectively to harassment.[40]

Employees who are harassed should take appropriate steps at an early stage to prevent the continuation of the objectionable conduct. In some cases, an employee who is offended by a supervisor's or coworker's conduct may feel he or she can raise it directly with the individual who engaged in the objectionable conduct. In other situations, where the employee believes that the employer's intervention is required to prevent further harassment, the employee should notify the official designated by the employer's complaint or harassment procedures. In some circumstances, it may be reasonable for the employee to notify another appropriate official not specifically designated by the employer to accept complaints, such as where the employer's procedure requires the employee to

report the harassment to his or her direct supervisor and that individual is the alleged harasser.

The following examples illustrate how the above practices may affect employer liability.

EXAMPLE 14
EMPLOYER NOT LIABLE FOR UNLAWFUL HARASSMENT BY A SUPERVISOR

Carla, a Guatemalan, claims that she was subjected to frequent offensive comments based on sex and national origin by her first-level supervisor. Carla was aware of the employer's anti-harassment complaint procedures, but did not notify her employer or explain her failure to follow those procedures. The employer learned of the harassment from Carla's coworker, and immediately conducted an investigation. The employer reprimanded the supervisor and transferred him to another division. The company is not liable for the harassment because it took reasonable preventive and corrective measures and Carla unreasonably failed to complain about the harassment.

EXAMPLE 15
EMPLOYER LIABLE FOR UNLAWFUL HARASSMENT BY A NON-EMPLOYEE

Charles is a frequent visitor on XYZ Senior Community's "neighborhood days," when XYZ allows senior citizens in the neighborhood to visit its residents. During his visits, Charles often yells derogatory comments about Asians at Cheryl, a Filipino employee, and has even pushed and tripped her on a few occasions. Cheryl complains about the conduct to a manager, and is told that XYZ cannot take any action against Charles because he is not a resident. On subsequent visits, Charles continues to yell ethnic slurs at Cheryl, and she files an EEOC charge. XYZ is liable for the actions of Charles, a non-employee, because it had the power to control Charles's access to the premises, was aware of Charles's offensive conduct, and did not take corrective action.

13-V LANGUAGE ISSUES[41]

As the U.S. labor force has grown more ethnically diverse, the number of workers who are not native English speakers has increased dramatically. In the year 2000, approximately 45 million Americans (17.5 percent of the population) spoke a language other than English in the home. Of those individuals, approximately 10.3 million individuals (4.1 percent of the total population) spoke little or no English, an increase from 6.7 million in the year 1990.[42]

Employers sometimes have legitimate business reasons for basing employment decisions on linguistic characteristics. However, linguistic characteristics are closely associated with national origin. Therefore, employers should ensure that the business reason for reliance on a linguistic characteristic justifies any burdens placed on individuals because of their national origin. The subsections below provide guidance on employment decisions that are based on foreign accent or fluency, and guidance on policies requiring employees to speak only English while in the workplace.

A. Accent Discrimination

Because linguistic characteristics are a component of national origin, employers should carefully scrutinize employment decisions that are based on accent to ensure that they do not violate Title VII. (43)

An employment decision based on foreign accent does not violate Title VII if an individual's accent materially interferes with the ability to perform job duties. This assessment depends upon the specific duties of the position in question and the extent to which the individual's accent affects his or her ability to perform job duties. Employers should distinguish between a merely discernible foreign accent and one that interferes with communication skills necessary to perform job duties.(44) Generally, an employer may only base an employment decision on accent if effective oral communication in English is required to perform job duties and the individual's foreign accent materially interferes with his or her ability to communicate orally in English. Positions for which effective oral communication in English may be required include teaching, customer service, and telemarketing. Even for these positions, an employer must still determine whether the particular individual's accent interferes with the ability to perform job duties. The examples below illustrate how to apply these principles.

EXAMPLE 16
EMPLOYMENT DECISION WHERE ACCENT IS NOT A MATERIAL FACTOR

Anna, a Pakistani librarian in an elementary school, is responsible for cataloguing, researching, and reading aloud to young children. Her performance evaluations reflect that she is an excellent cataloguer and researcher and that she can communicate effectively with teachers and older children, but that some of the youngest children have had difficulty understanding her due to her accent. When her position is eliminated, Anna asks the local school board to transfer her to a position at a high school that involves cataloguing and researching but requires minimal student contact. The school board appropriately grants Anna's transfer request because Anna is qualified and her accent would not materially interfere with her ability to perform the librarian position at the high school.

EXAMPLE 17
EMPLOYMENT DECISION WHERE ACCENT IS A MATERIAL FACTOR

A major aspect of Bill's position as a concierge for XYZ Hotel is assisting guests with directions and travel arrangements. Numerous people have complained that they cannot understand Bill because of his heavy Ghanaian accent. Therefore, XYZ notifies Bill that he is being transferred to a clerical position that does not involve extensive spoken communication. The transfer does not violate Title VII because Bill's accent materially interferes with his ability to perform the functions of the concierge position.

B. Fluency Requirements

1. English Fluency

Generally, a fluency requirement is permissible only if required for the effective performance of the position for which it is imposed. Because the degree of fluency that may be lawfully required varies from one position to the next, employers should avoid fluency requirements that apply uniformly to a broad range of dissimilar positions.

As with a foreign accent, an individual's lack of proficiency in English may interfere with job performance in some circumstances, but not in others. For example, an individual who is sufficiently proficient in spoken English to qualify as a cashier at a fast food restaurant may lack the written language skills to perform a managerial position at the same restaurant requiring the completion of copious paperwork in English.[45] As illustrated below, the employer should not require a greater degree of fluency than is necessary for the relevant position.

EXAMPLE 18
LAWFUL ENGLISH FLUENCY REQUIREMENTS

Jorge, a Dominican national, applies for a sales position with XYZ Appliances, a small retailer of home appliances in a non-bilingual, English-speaking community. Jorge has very limited skill with spoken English. XYZ notifies him that he is not qualified for a sales position because his ability to effectively assist customers is limited. However, XYZ offers to consider him for a position in the stock room. Under these circumstances, XYZ's decision to exclude Jorge from the sales position does *not* violate Title VII.

2. Foreign Language Fluency

With American society growing more diverse, employers have increasingly required that some employees be fluent in languages other than English. For example, a business that provides services to Spanish-speaking customers might have a sound business reason for requiring that some of its employees speak Spanish. As with English fluency requirements, requirements for fluency in foreign languages must actually be necessary for the positions for which they are imposed.

A business with a diverse clientele may assign work based on foreign language ability. For example, an employer may assign bilingual Spanish-speaking employees to provide services to customers who speak Spanish, while assigning employees who only speak English to provide services to English-speaking customers. Of course, employers should make such assignments based on language ability. In most cases, employers also may lawfully assign comparable work to employees based on their language skills, and are not required by Title VII to provide additional compensation for work that is performed in a foreign language.[46]

C. English-Only Rules

Some employers have instituted workplace policies restricting communication in languages other than English, often called "English-only rules." In fiscal year 2002, the Commission received 228 charges challenging English-only policies. The application of Title VII to such rules is discussed below.

1. Application of Title VII to English-Only Rules

Title VII permits employers to adopt English-only rules under certain circumstances. As with any other workplace policy, an English-only rule must be adopted for nondiscriminatory reasons. An English-only rule would be unlawful if it were adopted with the intent to discriminate on the basis of national origin. Likewise, a policy that prohibits some but not all of the foreign languages spoken in a workplace, such

as a no-Navajo rule, would be unlawful.

EXAMPLE 19
ENGLISH-ONLY RULE: INTENTIONAL DISCRIMINATION

XYZ Textile Corp. adopts a policy requiring employees to speak only English while in the workplace, including when speaking to coworkers during breaks or when making personal telephone calls. XYZ places Hispanic workers under close scrutiny to ensure compliance and replaces workers who violate the rule with non-Hispanics. Jose, a native Spanish speaker, files a charge with the EEOC alleging that the policy discriminates against him based on his national origin. XYZ states that the rule was adopted to promote better employee relations and to help improve English skills. However, the investigation reveals no evidence of poor employee relations due to communication in languages other than English. Nor are proficient English skills required for any of the positions held by non-native English speakers. Because XYZ's explanation is contradicted by the evidence, the English-only rule is unlawful.[47]

Even where an English-only rule has been adopted for nondiscriminatory reasons, the employer's use of the rule should relate to specific circumstances in its workplace.[48] An English-only rule is justified by "business necessity" if it is needed for an employer to operate safely or efficiently. The following are some situations in which business necessity would justify an English-only rule:

- For communications with customers, coworkers, or supervisors who only speak English
- In emergencies or other situations in which workers must speak a common language to promote safety
- For cooperative work assignments in which the English-only rule is needed to promote efficiency
- To enable a supervisor who only speaks English to monitor the performance of an employee whose job duties require communication with coworkers or customers

The following is an example of a narrowly crafted English-only rule promoting safety in the workplace.

EXAMPLE 20
PERMISSIBLE ENGLISH-ONLY RULE: PROMOTING SAFETY

XYZ Petroleum Corp. operates an oil refinery and has a rule requiring all employees to speak only English during an emergency. The rule also requires that employees speak in English while performing job duties in laboratories and processing areas where there is the danger of fire or explosion. The rule does not apply to casual conversations between employees in the laboratory or processing areas when they are *not* performing a job duty. The English-only rule does not violate Title VII because it is narrowly tailored to safety requirements.[49]

2. Best Practices

In evaluating whether to adopt an English-only rule, an employer should weigh business justifications

for the rule against possible discriminatory effects of the rule. While there is no precise test for making this evaluation, relevant considerations include:

- Evidence of safety justifications for the rule
- Evidence of other business justifications for the rule, such as supervision or effective communication with customers
- Likely effectiveness of the rule in carrying out objectives
- English proficiency of workers affected by the rule[50]

Before adopting an English-only rule, the employer should consider whether there are any alternatives to an English-only rule that would be equally effective in promoting safety or efficiency.

EXAMPLE 21
ENGLISH-ONLY RULE: NONDISCRIMINATORY ALTERNATIVE

At a management meeting of XYZ Electronics Co., a supervisor proposes that the company adopt an English-only rule to decrease tensions among its ethnically diverse workforce. He reports that two of the employees he supervises, Ann and Vinh, made derogatory comments in Vietnamese about their coworkers. Because such examples of misconduct are isolated and thus can be addressed effectively under the company's discipline policy, XYZ decides that the circumstances do not justify adoption of a facility-wide English-only rule. To reduce the likelihood of future incidents, XYZ supervisors are instructed to counsel line employees about appropriate workplace conduct.[51]

An employer should ensure that affected employees are notified about an English-only rule and the consequences for violation. The employer may provide notice by any reasonable means under the circumstances, such as a meeting, e-mail, or posting. In some cases, it may be necessary for an employer to provide notice in English *and* in the other native languages spoken by its workers. A grace period before the effective date of the rule also may be required to ensure that all workers have received notice.

13-VI CITIZENSHIP-RELATED ISSUES[52]

A. Citizenship Requirements

Discrimination based on citizenship violates Title VII's prohibition against national origin discrimination under limited circumstances. While Title VII does not prohibit citizenship discrimination per se, citizenship discrimination does violate Title VII where it has the "purpose or effect" of discriminating on the basis of national origin.[53] For example, a citizenship requirement would be unlawful if it is a "pretext" for national origin discrimination, or if it is part of a wider scheme of national origin discrimination.[54]

EXAMPLE 22
CITIZENSHIP REQUIREMENT AS PRETEXT FOR NATIONAL ORIGIN DISCRIMINATION

Juanita is a Mexican citizen living in Houston, Texas, and is authorized to work in the United States. She would like to apply for a position as a tour guide with XYZ Tours, for which she meets all of the stated qualifications except U.S. citizenship. Believing the policy of requiring U.S. citizenship to be discriminatory, she files a charge with the EEOC. The investigation reveals that XYZ recently employed several tour guides who were citizens of northern European countries, but has never hired citizens of South American or African countries as tour guides. Based on these facts, the investigator concludes that XYZ's citizenship requirement is a pretext for unlawful national origin discrimination.

EXAMPLE 23
CITIZENSHIP REQUIREMENT THAT IS PART OF WIDER SCHEME OF NATIONAL ORIGIN DISCRIMINATION

Luis, a Mexican citizen, files a charge with the EEOC alleging that he was not promoted from his unskilled laborer position to a skilled craft position by XYZ Petroleum Company because of his Mexican national origin. The investigation reveals that XYZ has many Mexican-Americans employed in unskilled positions, but has a policy requiring that all of its higher-paid skilled workers be U.S. citizens. In addition, Hispanic applicants for entry-level, unskilled jobs are rejected at a much higher rate than non-Hispanic applicants, even accounting for differences in qualifications and/or experience. Hispanic employees also are generally given less favorable work assignments and paid less than non-Hispanic employees who are performing similar work. Under the circumstances, the evidence establishes that the citizenship requirement is part of a wider scheme of unlawful national origin discrimination and was adopted for unlawful discriminatory reasons.

Federal law requires U.S. citizenship for most federal civil service employment.[55] For such employment, the failure to hire an individual because he or she is not a U.S. citizen does not constitute national origin discrimination in violation of Title VII.

In addition to national origin claims under Title VII, individuals who are not U.S. citizens may have claims under other federal statutes, which are enforced by other agencies:

- **Immigration Reform and Control Act of 1986 (IRCA):** IRCA prohibits employers with four or more employees from discriminating because of citizenship status against U.S. citizens and certain classes of foreign nationals authorized to work in the United States with respect to hiring, referral, or discharge.[56] IRCA also prohibits national origin discrimination by employers with between four and fourteen employees. IRCA's nondiscrimination requirements are enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, at the Department of Justice.[57]
- **Fair Labor Standards Act (FLSA):** The FLSA requires, among other things, that covered workers, including those who are not U.S. citizens, be paid no less than the federally designated minimum wage. The FLSA is enforced by the Employment Standards Administration, Wage and Hour Division of the Department of Labor (DOL).[58]
- **Special Visa Programs:** Employment of foreign nationals under special visa programs, such as H-1B and H-2A visas, also may be subject to certain requirements related to wages, working

conditions, or other aspects of employment. The Wage and Hour Division of DOL investigates alleged violations of some visa program requirements, including H-1B and H-2A visa requirements.[59]

B. Coverage of Foreign Nationals

Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act (the EEO statutes) prohibit discrimination against employees who work in the United States for covered employers, regardless of citizenship[60] or work authorization. While federal law prohibits employers from employing individuals lacking work authorization, employers who nonetheless employ undocumented workers are prohibited from discriminating against those workers.[61]

The Commission has taken the position that foreign nationals are covered by the EEO statutes when they apply for U.S.-based employment from outside the United States.[62] If the employment is outside the United States, however, individuals who are not U.S. citizens are *not* protected by the U.S. EEO statutes.

13-VII RELATED ISSUES

A. Retaliation

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. For a detailed discussion of the prohibition against retaliation, refer to Section 8: *Retaliation*, EEOC Compliance Manual, Volume II (BNA) (1998).

EXAMPLE 24
RETALIATION VIOLATES TITLE VII

In an EEOC investigation, Daniel provided testimony that a coworker was subjected to harassment based on her Polish ancestry. After participating in the EEOC investigation, Daniel was no longer assigned overtime, and he filed an EEOC charge alleging that the denial of overtime was discriminatory. Daniel's employer states that Daniel was not assigned overtime because there was less work. The investigation reveals no significant change in the amount of overtime available before and after Daniel was removed from the list. Other employees with similar qualifications as Daniel have continued to be assigned overtime at approximately the same rate. These facts establish that Daniel has been subjected to retaliation in violation of Title VII for participating in an EEOC investigation.

B. Foreign Employers in the United States and American Employers Overseas

With a few exceptions, foreign employers doing business in the United States are covered by Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act to the same extent as American employers. Similarly, American employers overseas are generally covered in the same manner as American employers located in the United States with respect to employees who are U.S. citizens.[63] For further discussion of these issues, refer to Enforcement Guidance on

Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States (1993); and Policy Guidance on *Application of the Age Discrimination in Employment Act of 1967 (ADEA) and the Equal Pay Act of 1963 (EPA) to American Firms Overseas, Their Overseas Subsidiaries, and Foreign Firms* (1989).

1. Foreign Employers

A foreign employer doing business in the United States is generally covered by Title VII and the other EEO statutes to the same extent as an American employer. However, a foreign employer may discriminate in favor of its own nationals when permitted by a treaty.[64] The EEO statutes do not apply to employment actions taken by foreign employers overseas.

EXAMPLE 25
TREATY PERMITTING DISCRIMINATION IN FAVOR OF FOREIGN NATIONALS

XYZ Automotive, a Japanese automaker with a factory in Kansas, hired Pam, an American citizen of Japanese ancestry, for an executive position. John files a charge with the EEOC alleging that he was not selected for the position because he is not of Japanese ancestry. XYZ states that it lawfully considered Pam's Japanese ancestry pursuant to a treaty permitting it to favor Japanese applicants. The investigation reveals that the treaty permits XYZ to favor Japanese citizens, not individuals of Japanese ancestry. Because the treaty only permits favoritism based on Japanese *citizenship* and XYZ has instead engaged in favoritism based on Japanese *national origin*, XYZ has subjected John to national origin discrimination in violation of Title VII.

2. American Employers Overseas

Title VII, the ADEA, and the ADA generally prohibit discrimination against U.S. citizens by American employers operating overseas.[65] An employer operating abroad that is incorporated in the United States will generally have sufficient ties to the United States to be deemed an American employer. Where an employer is not incorporated in the United States or it is not incorporated at all, e.g., a partnership, various factors should be considered to determine if the employer has sufficient connections with the United States to make it an American employer. Factors to consider include the employer's principal place of business, the nationality of dominant shareholders and/or those holding voting control, and the nationality and location of management.

The EEO statutes also prohibit discrimination by a foreign employer that is controlled by an American employer. The determination of whether an American employer controls a foreign employer is based on the interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control of the American employer and the foreign employer.[66]

APPENDIX A HOW TO FILE A CHARGE

If you believe you have been discriminated against by an employer, labor union, or employment agency when applying for a job or while on the job because of your race, color, religion, sex, national origin,[67] age (40 or over), or disability, or believe that you have been discriminated against because

you opposed unlawful discrimination or participated in an equal employment opportunity (EEO) proceeding, you may file a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC). Charges against private sector and local and state government employers may be filed in person, by mail, or by telephone by contacting the nearest EEOC office. If there is no EEOC office in the immediate area, call toll free 1-800-669-4000 or 1-800-669-6820 (TTY) for more information. To avoid delay, call or write beforehand if you need special assistance, such as an interpreter, to file a charge. Federal sector employees and applicants should contact the EEO office of the agency responsible for the alleged discrimination to initiate EEO counseling.

There are strict time frames in which charges of employment discrimination must be filed or your agency's EEO office must be contacted. When charges or complaints are filed beyond these time frames, you may not be able to obtain any remedy. Charges against private sector or state or local governments must be filed with EEOC within 180 days of the alleged discriminatory act. The time frame is extended to 300 days if the alleged discrimination arose in a state or locality that has a fair employment practices agency (FEPA) with the authority to grant or seek relief for the alleged discrimination. Federal sector employees and applicants must initiate EEO counseling at the agency responsible for the alleged discrimination within 45 days of the alleged discriminatory event. Allegations of harassment based on race, color, religion, sex, or national origin are timely if at least one incident of harassment that is part of the larger pattern of harassment occurred within the filing period.

If you wish to remain anonymous during the period when an EEOC charge is being processed involving a private sector or state or local government employer, another individual or an organization may file a charge on your behalf. In some circumstances, an EEOC Commissioner may file a charge against a private sector or state or local government employer. Federal sector employees and applicants may remain anonymous during EEO counseling, but lose the right to anonymity after filing a formal complaint.

APPENDIX B WHEN A CHARGE IS FILED AGAINST YOUR COMPANY

This appendix provides general information regarding the processing of a charge alleging discrimination by a private sector or state or local government employer under the EEO statutes.[68] Anyone who believes that his or her employment rights have been violated because of race, color, sex, religion, national origin, age (40 or over), disability, opposition to unlawful discrimination, or participation in an EEO proceeding may file a charge of discrimination with the EEOC. A charge does not constitute a finding that your company did, in fact, discriminate. The EEOC has a responsibility to investigate and determine whether there is reasonable cause to believe discrimination occurred.

That process begins with the EEOC sending your company a copy of the charge, which will briefly identify the charging party, the basis (e.g., race, religion, etc.) and issues (hiring, promotion, etc.), and the date(s) of the alleged discrimination. You also may be asked to provide a response to the charge and supporting documentation. The EEOC also may ask to visit your work site or to interview some employees. It is important that your company retain records relating to issues under investigation as a result of the charge until the charge or any lawsuit based on the charge is resolved.

In some cases, the EEOC notice may offer mediation as a method of resolving the charge before an investigation. EEOC's mediation program is a free service, and participation is voluntary. The process is confidential, and there is a firewall (i.e., total separation) between the mediation program and EEOC's enforcement activities. Mediation provides employers and charging parties the opportunity to reach mutually agreeable solutions early in the process. The EEOC will notify your company if a charge is eligible for mediation. In the event that mediation does not succeed, the charge is referred for investigation.

If the EEOC finds reasonable cause to believe that your company discriminated against a charging party, it will invite you to conciliate the charge (i.e., the EEOC will offer you a chance to resolve the matter informally). In some cases, where conciliation fails, the EEOC will file a civil court action. If the EEOC does not find discrimination, or if conciliation fails and the EEOC chooses not to file suit, it will issue a notice of a right to sue, which gives the charging party 90 days to file a civil court action. The EEOC also must issue a notice of right to sue to the charging party on request if its handling of the charge is still pending after 180 days, or earlier if the EEOC knows it will take more than 180 days to complete action on the charge.

In all cases, your company should remember that it is unlawful to retaliate against the charging party for filing the charge, even if you believe the charge is without merit.

You should submit a response to the EEOC and provide the information requested, even if you believe the charge is frivolous. If the charge was not dismissed by the EEOC when it was received, that means there was some basis for proceeding with further investigation. There are many cases where it is unclear whether discrimination may have occurred and an investigation is necessary. You are encouraged to present any facts that you believe show the allegations are incorrect or do not amount to a violation of the law.

---

1. This Section replaces Section 622: *Citizenship, Residency Requirements, Aliens and Undocumented Workers*, EEOC Compliance Manual, Volume II; and Section 623: *Speak-English-Only Rules and Other Language Policies*, EEOC Compliance Manual, Volume II.

2. Title VII, which the EEOC enforces, covers employers with at least 15 employees. Note that the Immigration Reform and Control Act of 1986 (IRCA) prohibits national origin discrimination in hiring and discharge by employers with between four and fourteen employees. IRCA's nondiscrimination requirements are enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), Civil Rights Division, at the Department of Justice. *See generally* http://www.usdoj.gov/crt/osc (OSC home page). For detailed information on referral procedures for charges that may be within the jurisdiction of the Office of Special Counsel, EEOC investigators should consult the *Memorandum of Understanding Between the Equal Employment Opportunity Commission and the Office of Special Counsel for Immigration-Related Unfair Employment Practices* (1997), *available at* http://www.eeoc.gov/docs/oscmou.html.

The Internet links in this document were active as of November 20, 2002.

3. As the Supreme Court stated in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989), Title VII "eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice."

4. United States Census Bureau, Profile of the Foreign-Born Population in the United States: 2000, at 9 (2001), http://www.census.gov/prod/2002pubs/p23-206.pdf. (The foreign-born population increased from 4.7 percent in 1970 to 10.4 percent in 2000).

5. *Id.*

6. In the 1990 census, 2.8 percent of respondents identified themselves as Asian while in the 2000 census, 4.2 percent of respondents identified themselves as Asian. In the 2000 census, however, respondents could identify themselves by more than one race whereas in the 1990 census, they were required to choose only one race. Because of this change, the 1990 and 2000 figures are not strictly comparable. Peter Y. Hong, *Asian Americans Show Large Population Growth*, L.A. Times, Mar. 4, 2002, 2002 WL 2480914.

7. These figures on the Hispanic population are from the following U.S. Census Bureau publications: Table DP-1, "Profile of General Demographic Characteristics,"*at* http://censtats.census.gov/data/US/01000.pdf, and 1990 Census of Population: Social and Economic Characteristics, Table 4, "Race and Hispanic Origin: 1990," http://www.census.gov/prod/cen1990/cp2/cp-2-1.pdf. (The percentage of Hispanics increased from 8.8 percent to 12.5 percent.)

8. Kevin M. Pollard & William P. O'Hare, *America's Racial and Ethnic Minorities*, 54 Population Bull. 348 (1999), 1999 WL 31552240. In 1998, five percent of Black Americans were foreign-born, compared with about three percent in 1980. *See generally* Darryl Fears, *A Diverse-and Divided-Black Community*, Wash. Post, Feb. 24, 2002, *available at* 2002 WL 13820249.

9. *Immigrant Labor Force in U.S. Up Sharply*, Chicago Tribune, Sept. 4, 2000, *available at* 2000 WL 3704780.

10. Stephan-Goetz Richter & Daniel Bachman, *How to Keep Growth Alive: Welcome More Immigrants*, Wall St. Journal, July 22, 1999, *available at* 1999 WL-WSJ 5461407.

11. Equal Employment Opportunity Commission, Job Patterns for Minorities and Women in Private Industry 1 (2000).

12. Equal Employment Opportunity Commission, "Best" Equal Employment Opportunity Policies, Programs, and Practices in the Private Sector 7 (2d ed. 1998). The complete report is available at http://www.eeoc.gov/task/practice.html.

13. Glass Ceiling Commission, Good for Business: Making Full Use of the Nation's Human Capital 41 (1995), *available at* http://www.dol.gov/asp/programs/history/reich/reports/ceiling.pdf.

14. The analysis in this Section generally applies to both private and federal sector complaints of national origin discrimination.

15. Best practices are designed to reduce the likelihood of Title VII violations. A comprehensive overview of best practices is presented in the 1998 report "'Best' Equal Employment Opportunity Policies, Programs, and Practices in the Private Sector," which was prepared by an EEOC task force headed by Commissioner Reginald E. Jones. *See* note 12, *supra*. According to the report, a "best practice": complies with the law; promotes equal employment opportunity; shows management commitment and accountability; ensures management and employee communication; produces noteworthy results; and does not result in unfairness.

16. *See generally* 29 C.F.R. § 1606.1 (defining "national origin discrimination").

17. For example, Title VII prohibits discrimination against a non-Hispanic woman because she is married to a Hispanic man, *Chacon v. Ochs*, 780 F. Supp. 680, 682 (C.D. Cal. 1991), or discrimination against a non-Hispanic individual based on his or her association with the Hispanic community, *Reiter v. Ctr. Consol. Sch. Dist. No. 26-JT*, 618 F. Supp. 1458, 1459-60 (D. Colo. 1985).

18. Pyong Gap Min, *Ethnicity: Concepts, Theories, and Trends*, *in* Struggle for Ethnic Identity: Narratives by Asian American Professionals 16, 18 (Pyong Gap Min & Rose Kim eds., 1999) ("Language is the central component of culture, and as such it has the strongest effect on integrating members into a particular ethnic group.").

19. In *Janko v. Illinois State Toll Highway Authority*, 704 F. Supp. 1531, 1532 (N.D. Ill. 1989), the court found that discrimination based on an employee's status as a Gypsy constitutes national origin discrimination under Title VII, which prohibits discrimination based on "ethnic distinctions commonly

recognized at the time of the discrimination."

20. *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117 (9th Cir. 1998), *cert. denied*, 528 U.S. 1098 (2000). Title VII permits preferential treatment of American Indians under limited circumstances, though the exemption does not permit preferential treatment of members of one tribe over members of another tribe. 42 U.S.C. § 2000e-2(i); *see* EEOC Policy Statement on *Indian Preference Under Title VII*, 8 FEP Manual (BNA) 405:6647-54 (1988).

21. If the alleged employment discrimination is based on traits linked to national origin, then the alleged discriminator need not know the particular national origin group to which the charging party belongs. For example, discrimination against an individual because she has a "foreign-sounding" accent is a covered form of national origin discrimination. 45 Fed. Reg. 85,632, 85,633 (Dec. 29, 1980) (preamble to "Guidelines on Discrimination Because of National Origin").

22. Increasing ethnic diversity has been reflected in greater religious diversity in the workplace. In a survey of human resource professionals conducted by the Society for Human Resource Management and the Tanenbaum Center for Interreligious Understanding, 36 percent of respondents reported that more religions were represented in their workforces compared with five years ago. *See* http://www.shrm.org/press/releases/default.asp?page=062501d.htm.

23. As stated above, the employer still has a duty to accommodate religious practices under Title VII. For a detailed discussion of religious accommodation and undue hardship, refer to 29 C.F.R. § 1605.2.

24. While this document focuses on discrimination by employers, Title VII also prohibits discriminatory practices by labor organizations, including union membership and representation, and employment agencies, including referral practices.

25. For more information on liability for discrimination by clients, refer to Enforcement Guidance on *Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, Questions 8-9, 11 (BNA) (1997), *available at* http://www.eeoc.gov/docs/conting.html.

26. Equal Employment Opportunity Commission, "Best" Equal Employment Opportunity Policies, Programs, and Practices in the Private Sector 262-63 (2d ed. 1998).

27. For more information on when employers can lawfully impose English fluency requirements, refer to § 13-V B.1, below.

28. For further discussion of this issue, refer to Section 618: *Segregating, Limiting and Classifying Employees*, EEOC Compliance Manual, Volume II (BNA).

29. For more information on mixed-motives cases, refer to the Commission's Revised Enforcement Guidance on *Recent Developments in Disparate Treatment Theory* (BNA) (1992), *available at* http://www.eeoc.gov/docs/disparat.html.

30. 42 U.S.C. § 2000e-2(g). U.S. export laws also restrict the transfer of technology to foreign nationals from certain countries. Employer actions taken pursuant to requirements under U.S. export laws do not violate Title VII. *See generally* http://www.bxa.doc.gov (Bureau of Industry and Security home page).

31. *See Tenenbaum v. Caldera*, 45 Fed. Appx. 416, 418 (6th Cir. 2002) (unpublished) (courts may review cases in which an agency violates its own regulations in making a security clearance determination but may not review the substance of the clearance determination).

32. *See, e.g.*, USA PATRIOT Act of 2001, 50 U.S.C. § 1861.

33. For more information on hiring practices, including interviewing techniques, see American Bar Association, Guide to Workplace Law: Everything You Need to Know About Your Rights as an Employee or Employer 14-38 (1997); Donald H. Weiss, Fair, Square & Legal 34-86 (rev. ed. 1995).

34. *See generally* Peter Wylie & Mardy Grothe, Problem Employees: How to Improve Their Performance (2d ed. 1991); *see also* Dennis K. Reischl & Ralph Smith, The Federal Manager's Guide to Discipline (3d ed. 1997).

35. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

36. For guidance on evaluating whether national origin harassment creates a hostile work environment, refer to EEOC Policy Guidance on *Current Issues of Sexual Harassment* (1990), *available at* http://www.eeoc.gov/docs/currentissues.html; and EEOC Enforcement Guidance on *Harris v. Forklift Sys., Inc.* (1994), *available at* http://www.eeoc.gov/docs/harris.html. While these documents specifically address sexual harassment, most of the same principles also are relevant to Title VII's prohibition against national origin harassment.

37. The facts in this example are similar to those in *Amirmokri v. Baltimore Gas & Electric Co.*, 60 F.3d 1126 (4th Cir. 1995) (finding that Iranian emigrant employed as an engineer at a nuclear power plant established a prima facie case of national origin harassment).

38. The standard for employer liability for harassment by supervisors was established by the Supreme Court in two leading decisions addressing sexual harassment: *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The same standard applies to national origin harassment by a supervisor. *Gotfryd v. Book Covers, Inc.*, No. 97 C 7696, 1999 WL 20925, at *5 (N.D. Ill. Jan. 7, 1999) (applying *Ellerth* and *Faragher* standards to national origin discrimination).

39. The question of an employer's liability for harassment by non-employees may be affected by the extent of the employer's control over and any other legal responsibility that the employer may have had with respect to the conduct of non-employees. 29 C.F.R. § 1606.8(e).

40. Typically, employer policies related to national origin harassment can be part of broader policies addressing all prohibited forms of harassment, including harassment based on race, sex, religion, age, or disability. For more information on preventive measures related to harassment generally, refer to EEOC's Enforcement Guidance on *Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999), *available at* http://www.eeoc.gov/docs/harassment.html.

41. This subsection replaces Section 623: *Speak-English-Only Rules and Other Language Policies*, EEOC Compliance Manual, Volume II.

42. These figures are for individuals five years of age or older. In 1990, approximately 31.8 million Americans (13.8 percent of the population) spoke a language other than English in the home. Of those individuals, 6.7 million individuals (2.9 percent of the total population) spoke little or no English. These figures are from the following U.S. Census Bureau publications: 1990 Census of Population: Social and Economic Characteristics, Table 27, "Nativity, Citizenship, Year of Entry, and Language Spoken at Home," http://www.census.gov/prod/cen1990/cp2/cp-2-1.pdf,
and Table P035, "Age by Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over: Census 2000," http://factfinder.census.gov/servlet/DTTable?ds_name=D&geo_id=D&mt_name=ACS_C2SS_EST_G2000_P035&_lang=en.

43. 29 C.F.R. §1606.1. The court in *Fragante v. City & County of Honolulu,* 888 F.2d 591, 596 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990), stated that accent and national origin are "obviously inextricably intertwined," therefore requiring a "very searching look" at employment decisions based on accent.

44. For example, in *Carino v. University of Oklahoma Board of Regents*, 750 F.2d 815 (10th Cir. 1984), the court found that an individual with a noticeable Filipino accent was unlawfully demoted from his position as a supervisor and not considered for a supervisory position in a new facility. The court found that Carino's accent would not interfere with the duties required of a supervisor. *Id.* at 819. By contrast, in *Fragante v. City & County of Honolulu,* 888 F.2d 591, 597-98 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990), the court found that the employer lawfully refused to hire an individual with a pronounced Filipino accent for a position requiring constant phone communication with the public. The record revealed that Fragante's pronounced Filipino accent would make him difficult to understand over the telephone.

45. In *Shieh v. Lyng*, 710 F. Supp. 1024 (E.D. Pa. 1989), *aff'd*, 897 F.2d 523 (3d Cir. 1990) (table), the court found that the plaintiff was lawfully demoted because his language abilities were too limited to enable him to produce the complex scientific manuscripts required by his position.

46. For example, in *Cota v. Tucson Police Department*, 783 F. Supp. 458, 473-74 (D. Ariz. 1992), the court found that Title VII was not violated because, although Hispanic employees performed more Spanish-related tasks than non-Hispanic employees, there was no evidence that Hispanic workers performed extra or more difficult, rather than merely different, work.

47. The facts in this example are similar to those presented in *EEOC v. Premier Operator Services, Inc.*, 113 F. Supp. 2d 1066 (N.D. Tex. 2000). In that case, the court noted that Hispanic employees were "forced to be constantly on guard to avoid uttering their native language, even in their most private moments in the lunch room or on a break." One employee was reprimanded for speaking Spanish to her husband while at lunch in the break room. *Id.* at 1075.

48. The EEOC guidelines on English-only rules, 29 C.F.R. § 1606.7, state that English-only rules must be justified by "business necessity." Courts are divided on the application of Title VII to English-only rules and the validity of the EEOC guidelines. *Compare EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000) (English-only rules "disproportionately burden national origin minorities because they preclude many members of these groups from speaking the language in which they are best able to communicate."), *and EEOC v. Synchro-Start Prods. Inc*, 29 F. Supp. 2d 911, 914-15 (N.D. Ill. 1999) (English-only rules may create discriminatory work environment based on national origin), *with Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487-89 (9th Cir. 1993) (finding that the EEOC's guidelines on English-only rules could not be applied to truly bilingual employees because such individuals do not suffer any adverse impact from these rules and holding that the guidelines impermissibly presume that English-only policies have a disparate impact without requiring proof of such), *cert. denied*, 512 U.S. 1228 (1994), *and Long v. First Union Corp*, 894 F. Supp. 933, 940 (E.D. Va. 1995), *aff'd per curiam*, 86 F.3d 1151 (4th Cir. 1996) (table) (district court rejected the EEOC guidelines, and the Fourth Circuit affirmed without addressing the guidelines). Two other U.S. Courts of Appeals have upheld English-only policies without addressing the EEOC guidelines. *See Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *Gonzalez v. Salvation Army*, No. 89-1679-CIV-T-17, U.S. Dist. LEXIS 21692 (M.D. Fla. May 28, 1991), *aff'd*, 985 F.2d 578 (11th Cir. 1992) (table), *cert. denied*, 508 U.S. 910 (1993).

49. The facts in this example are similar to those in EEOC Dec. No. 83-7, ¶ 6836 (CCH) (1983).

50. To minimize the adverse effects that English-only rules may have for non-native English-speaking workers, employers also may want to consider providing an incentive for those workers to improve their English skills, such as English classes. Such specialized training will help workers with limited English skills acquire skills necessary for advancement.

A recent survey by the Society for Human Resource Management shows that a substantial number of large employers have begun to provide bilingual training for managers and employees and others have offered company-paid training in English as a second language. Society for Human Resource Management, Impact of Diversity Initiatives on the Bottom Line 4 (2001). In SHRM's survey, 22 percent of responding companies stated that they provide bilingual training for managers and

employees, and 19 percent offer company-paid training in English as a second language.

51. Courts have indicated that if the problem were more widespread, then the employer would be justified in adopting an English-only policy. *See, e.g., Roman v. Cornell Univ.*, 53 F. Supp. 2d 223, 237 (N.D.N.Y. 1999) (business reasons for an English-only rule may include "avoiding or lessening interpersonal conflicts, preventing non-foreign language speaking individuals from feeling left out of conversations, and preventing non-foreign language speaking individuals from feeling that they are being talked about in a language they do not understand"); *Long v. First Union Corp.*, 894 F. Supp. 933, 941 (E.D. Va. 1995) (English-only policy may be legitimate and necessary for business where adopted to "prevent employees from intentionally using their fluency in Spanish to isolate and to intimidate members of other ethnic groups"), *aff'd per curiam*, 86 F.3d 1151 (4th Cir. 1996) (table).

52. This subsection replaces Section 622: *Citizenship, Residency Requirements, Aliens and Undocumented Workers*, EEOC Compliance Manual, Volume II.

53. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92 (1973); 29 C.F.R. § 1606.5(a).

54. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92 (1973).

55. Exec. Order No. 11,935, 41 Fed. Reg. 37,301 (Sept. 2, 1976).

56. 8 U.S.C. § 1324b(a)(1)(B).

57. *See generally* http://www.usdoj.gov/crt/osc (OSC home page). For detailed information on referral procedures for charges that may be within the jurisdiction of the Office of Special Counsel, EEOC investigators should consult the *Memorandum of Understanding Between the Equal Employment Opportunity Commission and the Office of Special Counsel for Immigration-Related Unfair Employment Practices* (1997), *available at* http://www.eeoc.gov/docs/oscmou.html.

58. *See generally* http://www.dol.gov/esa/whd (Wage and Hour Division home page).

59. *See generally id.*

60. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

61. However, relief may be limited if an individual subjected to discrimination does not have appropriate work authorization. *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.*, 122 S. Ct. 1275, 1283-84 (2002).

62. The Commission took this position in an *amicus curiae* brief in *Reyes-Gaona v. North Carolina Growers Ass'n*, 250 F.3d 861 (4th Cir.), *cert. denied*, 122 S. Ct. 463 (2001). A copy of the Commission's *amicus curiae* brief is available at http://www.eeoc.gov/briefs/reyes.txt. The Fourth Circuit rejected the Commission's position, *id.* at 866-67, finding that the ADEA does not protect foreign nationals who apply for U.S.-based employment from outside the United States. *But cf. Denty v. SmithKline Beecham Corp.*, 109 F.3d 147, 150 (3d Cir.) (place where job is performed constitutes location of work site for ADEA coverage purposes), *cert. denied*, 522 U.S. 820 (1997); *Hu v. Skadden, Arps, Slate, Meagher & Flom LLP*, 76 F. Supp. 2d 476, 477-78 (S.D.N.Y. 1999) (non-U.S. citizen not protected by ADEA with respect to employment in Beijing and Hong Kong, even though employment interviews and hiring decisions were made in New York); *Gantchar v. United Airlines, Inc.*, No. 93 C 1457, 1995 WL 137053, at *4 (N.D. Ill. Mar. 28, 1995) (Title VII jurisdiction dependent on location of potential employment).

63. For a detailed discussion of the coverage requirements for employers, refer to Section 2: *Threshold Issues*, EEOC Compliance Manual, Volume II (BNA) § 2-III B.1.a (2000), *available at*

http://www.eeoc.gov/docs/threshold.html.

64. *See, e.g., Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1401 (7th Cir. 1997) (Treaty of Friendship, Commerce and Navigation between United States and Japan entitles companies of either nation to discriminate in favor of their own citizens even if the other nation prohibits such discrimination); *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1147 (3d Cir. 1988) (treaty between United States and Korea permitting each to have businesses in the other country managed by their own nationals did not conflict with Title VII's prohibition against intentional national origin discrimination), *cert. denied*, 493 U.S. 944 (1989).

65. Individuals who are not U.S. citizens are not protected against discrimination overseas. In addition, the Equal Pay Act does not apply overseas at all.

66. 42 U.S.C. § 2000e-1(c)(3) (Title VII); 29 U.S.C. § 623(h)(3) (ADEA); 42 U.S.C. § 12112(c)(2)(C) (ADA). This is the same test used by courts in determining whether two or more employers constitute an integrated enterprise.

67. Title VII covers employers with at least 15 employees. The Immigration Reform and Control Act of 1986 prohibits national origin discrimination in hiring and discharge by employers with between four and fourteen employees. IRCA's nondiscrimination requirements are enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, at the Department of Justice. *See generally* http://www.usdoj.gov/crt/osc (OSC home page).

68. The information presented in this appendix applies to private sector and state and local government employers only. For information on the processing of complaints against federal agencies, visit the EEOC's "Federal Sector Information" page on the Internet at http://www.eeoc.gov/federal/index.html. For more detailed information, small employers should visit the EEOC's "Information for Small Employers" page on the Internet at http://www.eeoc.gov/small/.

This page was last modified on December 12, 2002.

Return to Home Page