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New FEHC National Origin Discrimination Regulations

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The California Fair Employment and Housing Council (FEHC) issued new regulations under California's Fair Employment and Housing Act (FEHA) addressing national origin discrimination. Effective July 1, 2018, the regulations provide a broad definition of "national origin" and apply to applicants and employees, regardless of documentation status. The regulations impact employment practices such as English-only policies, English proficiency requirements, and height and weight requirements. The regulations also clarify that an applicant's or employee's immigration status is *irrelevant* during the liability phase of any proceeding brought to enforce FEHA.

Expansive Definition Of "National Origin" And "National Origin Group"

The new regulations define "national origin" to include the individual's or ancestors' *actual or perceived*:

1. physical, cultural, or linguistic characteristics associated with a national origin group;
2. marriage to or association with persons of a national origin group;
3. tribal affiliation;
4. membership in or association with an organization identified with or seeking to promote the interests of a national origin group;
5. attendance or participation in schools, churches, temples, mosques, or other religious
6. institutions generally used by persons of a national origin group; and
7. name that is associated with a national origin group.

"National origin group" is defined to include ethnic groups, geographic places of origin, and countries that are not presently in existence.

Prohibitions On Language Restriction Policies

The new regulations also address language restriction policies, including English-only policies. Language restriction policies are presumptively unlawful unless: (1) the restriction is justified by business necessity; (2) the restriction is narrowly tailored; and (3)

the employer has effectively notified its employees of the circumstances and time when the language restriction is required to be observed and of the consequence for violating the language restriction.

“Business necessity” is narrowly defined to mean an overriding legitimate business purpose, such that: (a) the language restriction is necessary to the safe and efficient operation of the business; (b) the language restriction effectively fulfills the business purpose it is supposed to serve; and (c) there is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact. A language restriction is *not* justified if it simply promotes business convenience or is due to customer or co-worker preference.

The regulations further clarify that **English-only rules are never lawful during non-work time** (breaks, lunch, etc.).

Discrimination Based On Accent And English Proficiency Requirements

The new regulations also clarify that discrimination based on an applicant’s or employee’s **accent** is unlawful unless the employer proves that the individual’s accent interferes materially with the applicant’s or employee’s ability to perform the job in question.

Further, discrimination based on an applicant’s or employee’s **English proficiency** also is unlawful unless the English proficiency requirement at issue is justified by business necessity (i.e., the level of proficiency required by the employer is necessary to effectively fulfill the job duties of the position.) The regulations specify that employers may request information regarding an applicant or employee's ability to speak, read, write, or understand any language, if justified by business necessity.

Height And Weight Requirements May Be Discriminatory

The new regulations recognize that height and/or weight requirements *may* have the effect of creating an unlawful disparate impact based on national origin. If adverse impact is established, the requirements are unlawful, unless the employer can demonstrate that they are job related and justified by business necessity. Even if job related and justified by business necessity, however, such a requirement is still unlawful if the applicant or employee can establish a less discriminatory alternative that achieves the purpose of the requirement.

Anti-Retaliation Provisions

The new regulations clarify that retaliation includes: (1) threatening to contact or contacting immigration authorities or a law enforcement agency about the immigration status of the employee, former employee, applicant, or a family member (defined expansively to include spouse, domestic partner, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, great-grandparent, grandchild, or great-grandchild, by blood, adoption, marriage, or domestic partnership) of the employee, former employee, or applicant; or (2) taking adverse action against an employee because the employee updates or attempts to update personal information based on a change of name, social security number, or government-issued employment documents.

Employer Takeaway

California employers should review their policies and practices to avoid claims of discrimination based on national origin. Specifically, employers should review any English-only policies and height or weight

requirements to ensure they comply with the new regulations. Also, employers should update application and recruiting documents and processes to protect against excluding potential applicants based on national origin. Further, employers should train managers and supervisors so that they understand the prohibitions against national origin discrimination and harassment.

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