



## XpertHR Podcast

January 24, 2017

# EEOC Takes Aim at Tackling National Origin Discrimination

This is XpertHR.com—Your “go-to” HR compliance resource for federal, state, and municipal law.

David Weisenfeld: I'm David Weisenfeld for XpertHR.com, published by Reed Business Information and proudly partnered with LexisNexis.

On this inaugural podcast of 2017, our attention turns to the EEOC's new enforcement guidance targeting national origin discrimination. It's a timely topic, and not just because the rhetoric on the campaign trail about Muslims and Mexicans was at times rather heated.

11% of the more than 90,000 claims filed against private employers in 2015 involved national origin bias. So what does the EEOC's guidance say and, more importantly, how will it affect the workplace? To find out, we'll speak with EEOC Senior Attorney Advisor, Muslima Lewis, who was involved in drafting the guidance. Muslima is with the Commission's Office of Legal Counsel and we're pleased to have her with us. Muslima, welcome.

Muslima Lewis: Thank you. It's a pleasure to be here, especially for the *inaugural* podcast for 2017!

David Weisenfeld: Well it's great to have you, and Muslima this guidance is the EEOC's first pronouncement on national origin discrimination since 2002. So why now? [0:01:30.9]

Muslima Lewis: Well I'll answer that but before I do respond, let me start with just a little bit of background. First of all let me emphasize what the EEOC's mission is. It's to stop and remedy unlawful employment discrimination. This includes unlawful employment discrimination based on national origin that violates Title 7 of the Civil Rights Act.

Now let me also talk a bit about what exactly national origin discrimination is. It means discrimination because an individual or her ancestors is from a certain place, or shares the physical traits or cultural characteristics or shares a common language within an ethnic group.

National origin discrimination can take the form of treating someone differently because of his or her national origin, and it also can take

the form of using an employment policy or practice that causes what's called a disparate impact on the basis of national origin, and is not shown to be job-related and consistent with business necessity.

Now with that backdrop, let me answer your question, 'Why did the EEOC issue this new enforcement guidance at the end of last year?'

So let me start with some numbers. During our fiscal year 2015, which ended on September 30<sup>th</sup> 2015 (which happens to be the most recent full year for which we have statistics), as you mentioned 11% of the almost 90,000 charges we received alleged some form of national origin discrimination, whether it's failure to hire or a termination, language-related issues or harassment. These numbers indicate that national origin discrimination is a persistent form of discrimination in our workplace and something that the EEOC really must address.

In addition, and importantly, there have been significant legal developments around the area of national origin discrimination since 2002, which is when we last issued a major policy document on the subject.

So the EEOC generally has to update its policy documents periodically to address recent and notable developments in the law if we are to serve our function of addressing workplace discrimination.

David Weisenfeld:

Now back in 2002, the EEOC was proceeding very much in the shadow of 9/11. Are some of the issues that the Commission saw back then still there when it comes to national origin bias in the workplace? [0:04:10.1]

Muslima Lewis:

Certainly. I mean national origin employment discrimination then – back in 2002 – and now, as I mentioned, can take many forms. And the new enforcement guidance does address those various ways that national origin discrimination can occur in the workplace.

So again, national origin discrimination can take place at various stages of an employment relationship and in various contexts. So the guidance now and in the past has addressed discrimination in recruitment, in hiring, in discipline, in termination.

Also there are the language-related policies and practices, such as English-only rules or fluency requirements or accent restrictions, all of which implicate national origin discrimination. And again there's also harassment based on national origin. These issues were addressed in 2002, and they are addressed – and in some cases expanded upon – in our 2016 guidance.

David Weisenfeld:

I'll get to those English-only rules and the issues surrounding them in a few minutes, because I definitely want to pick your brain about that, but I alluded at the top to the rhetoric from the election about Muslim bans. Has that contributed in any way to the number of national origin discrimination incidents that the Commission has been seeing in the past year or so? [0:05:40.6]

Muslima Lewis:

It's a really good question, and I'll note that it's a little bit of a digression, but a really important one that raises an important

concept. Your question implicates another form of discrimination that is prohibited by Title 7 – that is religious discrimination. The question also rightfully notes that discrimination against an individual may be based on a combination of protected bases. In this instance it may be a Middle Eastern and religion – the person being a Muslim.

For sure, after the devastating terrorist attacks on 9/11, the EEOC has seen a large number of charges alleging what is known as post-9/11 backlash discrimination. And to give some context to that, between September 11<sup>th</sup> 2001 and September 30<sup>th</sup> 2016, over 1,400 charges were filed with EEOC under Title 7 alleging this type of post-9/11 backlash.

We also can have some insights based on the number of religious discrimination charges that the EEOC receives based on the charging party being Muslim, or being *perceived* as Muslim, and here we have some interesting comparisons. So between September 11<sup>th</sup> 2001 and September 30<sup>th</sup> 2016, the EEOC received almost 11,000 charges of discrimination based on the charging party being Muslim or perceived to be Muslim. That's 11,000!

Let's compare that to a comparable period before September 11<sup>th</sup> 2001, where there were less than 2,500 charges based on the charging party being Muslim or perceived to be Muslim. That's an almost four-and-a-half-fold increase.

So for these reasons the EEOC has really made efforts to get out ahead of the issue and been proactive in issuing accessible Q&A documents that reinforce the workplace protections for individuals who are, or are perceived to be, Muslim or Middle Eastern, as well as a Q&A document for employers about their obligations towards those individuals, and the most recent Q&As of this nature were released just in 2015, after the Paris and San Bernardino attacks.

David Weisenfeld:

Muslima, following up on that point, one of the areas that the guidance addresses involves those intersectional claims to which you refer, particularly those where national origin bias and religious discrimination may intersect. What else can you tell us about that, that employers can take away? [0:08:33.9]

Muslima Lewis:

So intersectional discrimination is a form of discrimination that the enforcement guidance fleshes out a bit more this time than it has in the past. As I mentioned, intersectional discrimination occurs when someone's discriminated against because of a combination of two or more protected bases. And when there is intersectional discrimination that involves national origin, the other bases that are frequently raised include, let's say, sex or religion, as I mentioned before, race or color.

And I think one way that I can best describe intersectional discrimination is by talking about an example that we actually have in the enforcement guidance. In this example, a qualified Mexican-American woman claims that she was denied a promotion and that those promotional opportunities were instead given to a non-Mexican American woman and a Mexican man. In this instance, her charge of discrimination would allege discrimination based on sex and race and national origin. And I'll just use this as a moment to highlight the fact

that our guidance throughout provides very accessible examples such as this to illustrate the principles that we present.

David Weisenfeld:

Well you alluded to employees of Mexican descent, and there have been a few stories of those types of employees facing harassment on the job. So any special concern regarding those of Mexican ancestry or even those perceived to be of Mexican descent in the workplace? [0:10:18.2]

Muslima Lewis:

I think what I'd like to do is step back again and just note that our workplaces in the US are really microcosms of the larger society. So as we talked about before, when there's a rise of Islamophobia, for example, in the general public discourse, absent vigilance on the part of employers, that can show up as discrimination based on religion in the workplace.

The same holds true when there's any form of prejudice or bigotry that is part of the discourse in our larger society, whether it's based on race or national origin, such as Mexican national origin or ethnicity, or sex, or any other protected basis. Though when this happens, it really does behoove employers to be proactive in setting a very clear tone and sending a very clear message that they will vigilantly enforce the laws to keep their workforces free of this unlawful discrimination.

But I also want to mention something that your question raises, and this has to do with really the general immigration question. So let me just touch on that briefly.

The immigration laws are clear that employers are prohibited from hiring individuals who are not authorized to work. However, the protections of Title 7 apply regardless of an applicant's or an employee's immigration status or authorization to work.

There are laws such as the anti-discrimination provision of the Immigration and Nationality Act, not enforced by the EEOC but enforced by a division of the Department of Justice, the Office of Special Counsel, which has recently been renamed, that prohibit discrimination based on immigration status or citizenship.

So that's the general context within which we can look at some of these issues that are raising in the larger society around immigration and citizenship.

David Weisenfeld:

Again we're speaking with EEOC Senior Attorney Advisor Muslima Lewis, and Muslima you were just speaking about the importance of being proactive in that last answer. So what are some examples of some best practices that can help employers avoid discriminatory treatment? [0:12:40.3]

Muslima Lewis:

Great question. And one of the things that our enforcement guidance does is to provide what we call promising practices. The national origin enforcement guidance includes promising practices in a few different areas – hiring, promotion and assignment, discipline and harassment.

So to give some examples, in the area of recruitment the enforcement guidance notes that reliance on informal recruitment, such as word-of-mouth, could have the effect of exacerbating or magnifying any existing racial, ethnic or religious disparities that may already exist in the workplace.

So one of the promising practices that the enforcement guidance mentions is that to avoid inadvertently excluding certain national origin groups, an employer may want to use a variety of recruitment methods and not rely exclusively on word-of-mouth.

Another promising practice that is noted in the guidance in the area of hiring, promotion and assignment has to do with using objective, written criteria in those areas. By doing this, employers can be more confident that they are, in fact, selecting the most qualified candidates for hire or for promotion.

And in the same vein, it's a promising practice that we've highlighted in the guidance that employers use objective job-related criteria to evaluate employees' performance, and that they use progressive discipline policies that clearly communicate what those objective performance expectations are.

Finally, in the area of harassment – and this is something that employers are very familiar with – having a very clear, written anti-harassment policy with very clear steps for how employees can report complaints can be very helpful in preventing a discriminatory, hostile work environment.

And something that's unique in the context of national origin discrimination is being mindful of whether those policies should be translated into the languages spoken by employees, and whether the trainings on those policies that the employer conducts should be in different languages. All of that ensures that employees truly do understand what the policies are and that they truly do understand how to make complaints.

So those are a few of the promising practices that we've outlined in the enforcement guidance.

David Weisenfeld:

I'll use that last one about having policies in different languages as a segue to my next question, which involves English-only policies in the workplace. Are they ever OK, and what's the EEOC's view on them? [0:15:49.2]

Muslima Lewis:

Let me answer that question in a couple of steps. First of all let me explain what a language-restricted policy is. That is a policy, such as an English-only policy, that limits the language or languages that employees may speak in the workplace. It could be English-only. It could be some other language that is preferred.

The guidance states that a language-restricted policy is unlawful if it is adopted for discriminatory reasons, such as bias against employees of a particular national origin group. But the guidance also addresses the EEOC's very longstanding policy that requiring employees to speak one language, such as only English, at *all* times in the workplace, including for example during breaks or at lunchtime

or on their personal time, is presumed to violate Title 7. This has been the EEOC's longstanding policy as early as 1980, when it was set forth in our guidance on national origin discrimination.

So that describes what happens when you have a blanket language-restrictive policy. So let me now talk a bit about those circumstances where there is a language-restrictive policy that is not blanket, that is it doesn't apply at all times. In those cases it may not violate Title 7.

The analysis is that whether these policies violate Title 7 really depends on whether the evidence shows that the policy is job-related and consistent with business necessity. That's really the touchstone.

The employer may satisfy this standard, this job-related and consistent with business necessity standard, by providing detailed, fact-specific and credible evidence that would demonstrate that the business purpose of requiring employees to speak a common language is sufficiently necessary to the safe and efficient job performance or safe and efficient business operations. Sufficient enough to override what could be its adverse impact. And also that the policy is narrowly tailored to minimize any discriminatory impact based on national origin.

But important to note, though – and this is highlighted in the guidance – because language is so intimately associated with a person's ethnicity or national origin, a language-restrictive policy may actually contribute to a hostile work environment, and the enforcement guidance discusses that as well.

David Weisenfeld: Well we only have a minute or so left, so Muslima do you have a final takeaway lesson or thought for our listeners before we let you go? [0:18:46.0]

Muslima Lewis: I think for your listeners, one thing to just bear in mind, it may seem that this nice, very comprehensive document may be a bit overwhelming to take on all at once, but I do want to highlight that the EEOC has issued some very accessible companion documents that are really a very good starting point for employers and for employees. So there is a small business factsheet, as well as a Q&A document that breaks down some of these principles into very digestible, very accessible pieces. And I would encourage employers and employees and job applicants to take a look at those to really get a broad summary of the issues that we address in our guidance.

David Weisenfeld: And those are all available on EEOC.gov? [0:19:36.3]

Muslima Lewis: That is right. They're all on EEOC.gov.

David Weisenfeld: Muslima Lewis has been our guest. Muslima is a Senior Attorney Advisor with the EEOC's Office of Legal Counsel, and she helped draft the Commission's national origin discrimination enforcement guidance. Muslima, thanks for sharing your insights.

Muslima Lewis: Thank you so much. I appreciate the opportunity.

David Weisenfeld: Well we enjoyed having you. I'm David Weisenfeld. We hope you've enjoyed this podcast. Thanks for listening. Continue checking our

website regularly for more podcasts on key employment-related topics, including Truth and Consequences – What the 2016 Election Means for HR.

The opinions expressed in this program do not represent legal advice, nor should they necessarily be taken as the views of XpertHR or its employees. XpertHR.com is published by Reed Business Information, and is proudly partnered with LexisNexis.

For more information about XpertHR, our subscription offering, or our 50-state Employee Handbook, call us toll free at 1-855-973-7847. Again, that's 1-855-973-7847.

Copyright 2017. All rights reserved.