

# An Act Opposing Unnecessary Language Restrictions in the Workplace (H. 1851)

## **1) In brief, what would this bill do?**

This act would disallow the use of "English Only" rules in the workplace except where an employer could establish a business necessity for such a policy. This bill is similar in intent to a California law instituted in 2002. Workers throughout the Commonwealth, and in particular in the Boston metro area, have been terminated in recent years for violating "English Only" rules.

## **2) What is an English Only rule?**

English Only rules are workplace policies which typically prohibit casual conversations from occurring in a workplace, unless the conversations are in English. Such rules are often promulgated in workplaces where bilingual workers are still expected to speak to customers in a non-English language on a regular basis, but are disallowed from speaking that same language during casual conversations with co-workers. Workers who violate such rules are typically reprimanded or terminated. Most frequently, English Only rules are broadly applied, and, for example, may limit all communications to English except:

- a) when employees are on lunch break; or
- b) when they are helping out a non-English speaking customer or client.

## **3) Don't employees have First Amendment Constitutional rights that guarantee their freedom of speech?**

Yes, they do, however, speaking on the job, particularly when such speech is not business-related, is considered a privilege of employment that an employer may either grant or withhold. An employee's right to Free Speech can thus often be lawfully curtailed in the workforce, provided that such restrictions on language use do not discriminate on the basis of race or national origin.

## **4) Why do people promulgate English Only rules?**

English Only policies are put into place in response to xenophobic complaints by co-workers and customers that Latinos (or another language minority group) must be "talking about them" and that this is the reason people slip into the use of their native languages.

English Only rules tend to appear in businesses when a large percentage of the staff and/or the clientele of the business are from one non-English language group. Economic and social pressures drive employers to promulgate these rules.

Frequently, in workplaces with English Only rules, there is a bitter irony that bilinguals are hired for their ability to deal with bilingual customers, but are then targeted for punishment when they use their native languages when not speaking to a customer. As Latinos have been the most common target of these policies, they are known as "Hired for speaking Spanish, and fired for speaking Spanish" rules.

## **5) If customers complain about people speaking non-English languages, isn't it just smart business practice to allow employers to control all aspects of employee speech?**

Some employers claim that their monolingual English-speaking customers or employees find that hearing non-English languages is disturbing or offensive. These employers often respond by promulgating English Only rules. These rules all-too-often, do not actually prevent employees and customers from hearing non-English languages, as bilingual employees are often required, even in workplaces with English Only rules, to speak non-English languages whenever a customer requests it.

These rules are also designed to appeal to one type of customer – monolingual English speakers. Even if a business has a high percentage of Spanish-speaking customers, for instance, rarely if ever do businesses demand that only Spanish be spoken by all employees in front of those customers.

Even were such broad language restrictions able to successfully appeal to most customers, it is worth nothing that not all policies that benefit the employer or his business goals are lawful. In *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971), the 5<sup>th</sup> Circuit Court of Appeals declared that hiring only females as flight attendants was unlawful even though customers overwhelmingly preferred female attendants. Similarly, it is a long-standing legal paradigm that one cannot hire only white employees simply because customers will refuse to be served by employees of other races. Basing business decisions on the racist or xenophobic fears of some clients or co-workers, even if it better supports the profit margins of the business, should be unlawful.

## **6) So aren't English Only rules already unlawful?**

This largely depends on who you ask. The U.S. Civil Rights Act of 1964 (as amended in 1991) refers to race and national origin discrimination, but not language discrimination. Language discrimination tends to be classified as a form of race or more commonly national origin discrimination by some courts and by the federal Equal Employment Opportunities Commission (EEOC). The EEOC has regulations which should nominally render it unlawful to have an English Only rule for most purposes without a business

necessity for such a rule. Unfortunately, conservative courts have consistently held either, that EEOC regulations do not have the weight of law and can be ignored by the courts, or alternately the courts supposedly consider the EEOC regulations, but allow the preference of almost any customer or co-worker to count as an absolute necessity for the business to function, at least with regards to the applicability of English Only rules against employees who speak even a modicum of English.

While at one point one precedential case existed against English Only rules, it was later vacated as moot (*Gutierrez v. Municipal Court of S.E. Judicial District*, 838 F.2d 1031 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989)). The remaining three precedential federal cases regarding English Only rules have come down on the side of the employer (*Garcia v. Gloor*, 618 F.2d 264 (5<sup>th</sup> Cir. 1980), cert. denied, 449 U.S. 1113 (1981); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1408 (9th Cir. 1987); and *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), reh'g en banc denied, 13 F.3d 296 (9th Cir. 1993), cert. denied, U.S., 114 S.Ct. 2726 (1994)). At the district court level, two recent cases have favored employees' rights to be free from English Only rules (*EEOC v. Premier Operator Services, Inc.* (75 F. Supp. 2d 550; 1999 U.S. Dist. LEXIS 20710); and *EEOC v. Synchro-Start Products, Inc.* (29 F. Supp. 2d 911; 1999 U.S. Dist. LEXIS 471; 78 Fair Empl. Prac. Cas. (BNA) 1486; 75 Empl. Prac. Dec. (CCH) P45,883)). The EEOC has won some very large out-of-court settlements, some over \$2 million. But almost all other district court cases involving English Only employment rules have been decided in the favor of employers.

Without a major change of federal law, then, there is little reliable protection for most employees without changes in state laws. For example, in response to a pro-English Only federal court decision in California, the California state legislature, in 2002, passed an anti-English Only rule (California Government Code section 12951). That law has some loopholes in it, however, and in most conservative jurisdictions it might do little more than the EEOC regulations.

Nebraska also has some protections for non-native speakers of English, but the Nebraska law applies only to companies with a very large number of employees, and has numerous additional restrictions before protections against discrimination take effect. Neb. Rev. Stat. § 48-2201 to 48-2206.

In summary, while English Only rules ought to be held unlawful, and while they are occasionally held to be unlawful, more often than not a typical English Only rule is considered lawful when applied to employees who speak even a minimal level of English. A state law against such discriminatory rules needs to be passed in Massachusetts to protect our employees from hazing.

## **7) Would this law prevent employers from having requirements that some employees be able to speak English?**

This law doesn't address such requirements at all. It only attempts to address workplace rules which unnecessarily prevent people from speaking the language of their choice when speaking to other employees who speak the same language.

## **8) Can you give me an example of an English Only rule that would be lawful if this bill were passed into law?**

- a) Except for brief, accidental slips into his or her native language, an employee who was relatively fluent in English could be required to speak English to all customers who speak English to the employee; and
- b) Employees who did not know which language a customer speaks could be asked to try speaking to new customers in English before switching to other languages.

## **9) Can't bilinguals actually easily comply with English Only rules?**

First, not all people who speak two languages speak them equally well. So some people might only be able to comply with an English Only rule with great difficulty. Others who are bilingual are still very likely to "code switch" unconsciously. Code switching is the linguistic phenomenon where a speaker switches back and forth between languages that he knows. Typically bilinguals who encounter a monolingual English speaker that they don't know will speak English. However, should Latinos, for example, be surrounded by many other Latinos, and should speaking Spanish be a reasonably frequent requirement of employment (to speak to Spanish-speaking customers, for example), then Latinos will tend to unconsciously switch either for short or long periods of time into speaking Spanish. This makes it difficult for even fluent bilinguals to consistently comply with English Only rules at all times.

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