

January 10, 2005

Advisory on the Civil Rights of Immigrant Workers Prohibitions on National Origin, Race and Color Discrimination

Massachusetts and federal law prohibit national origin discrimination in the workplace and render it unlawful to treat a person differently based on his or her place of origin, or on the physical, cultural or linguistic characteristics of a person's national origin group. Race and/or color discrimination is often found alongside a claim of national origin discrimination and pertains to a person's distinctive physical characteristics (for example, skin color or facial features). It is unlawful for supervisors and managers in the workplace to make employment-related decisions based on stereotypical and biased assumptions about individuals of a particular national origin, race and/or color or for any employee to engage in bias-motivated conduct that creates a hostile work environment for a protected class member. Furthermore, an employer who retaliates against an employee who opposes discriminatory practices, including when the employee files a complaint with a state or federal agency, violates state and federal law.

State and federal anti-discrimination laws apply to, and protect, all workers in Massachusetts, including citizens and non-citizens, and documented and undocumented workers.

It is important for each employer to ensure that all staff are aware of the civil rights of immigrant co-workers (and their offspring) or risk legal liability in the event that state and federal anti-discrimination laws are violated.

English-Only Policies

1. An English Only Policy Applied At All Times in the Workplace is Unlawful. An immigrant worker's primary language is often an integral part of his or her cultural identity and "an essential national origin characteristic."¹ Workplace rules which forbid the use of primary language at all times in the workplace subject immigrant workers to discriminatory terms and conditions of employment and are presumed to violate Title VII of the 1964 Civil Rights Act and the Massachusetts Fair Employment Practices Act, G.L. c.151B.²

2. Employers May Adopt an English-Only Policy Applied at Certain Times in the Workplace. An employer may apply an English-only policy if:

(1) The employer adopts the Policy for a non-discriminatory reason. It would be unlawful, for example, to target some or all immigrant workers by adopting an English-only rule in an effort to replace non-native English speakers with only English speakers, or to bar only one language but not others from the workplace.³

(2) A business necessity supports the Policy. The “business necessity” must arise from the particular circumstances found in the workplace. For example, a “business necessity” may include safety in job positions that pose a potential danger to workers and effective communication with customers/clients.⁴

(3) The Policy is narrowly tailored. English-only rules should not apply to breaks, lunches, or personal telephone calls or to casual conversations between employees in public places or work areas out of the presence of residents or customers.⁵

(4) The employer gives reasonable notice of the Policy and consequences for violations. An employer must communicate an English-only rule to its employees.⁶

An employer should not apply an English-only Policy to an employee who is unable to communicate in English.⁷

3. An employer must apply an English-Only Policy uniformly. An employer who adopts a valid English-only Policy may still face liability for violation of a worker’s rights if the employer’s managers and supervisors do not enforce the Policy consistently, or enforce it aggressively against employees of a particular national origin, race or color, while overlooking infractions by persons from other groups.⁸

4. An employer may not use an English-only Policy to harass protected workers. A valid English-only Policy may cause or exacerbate ethnic and racial tensions and contribute to a hostile work environment for members of national origin groups against whom the policy is enforced. Enforcement of a Policy in a draconian and humiliating manner, or for minor infractions or inadvertent slips, can contribute to a discriminatory work environment.⁹

5. Best Business Practices if an Employer Adopts an English-Only Policy.

(1) Put the Policy in Writing. The written Policy should be clear about: (1) when and where it applies and when and where it does not; (2) the consequences for not following the Policy; (3) prohibiting discriminatory or selective enforcement; (4) prohibiting demeaning and/or disrespectful enforcement; (5) prohibiting harsh responses to unintentional language lapses; and (6) disciplinary action for failure to adhere to the Policy.

The Policy should also: (1) identify who can enforce it; (2) establish a procedure for addressing an employee’s failure to adhere to the Policy (including an opportunity for an employee to respond and to appeal any disciplinary action); and (3) establish a process for employees to complain about enforcement of the Policy.

(2) Distribute the Policy. The Policy should be distributed annually to all staff and to any new staff member as soon as they are hired. The Policy should be translated into the native languages of all employees who must follow it and distributed accordingly.

(3) Regular Review of Policy Enforcement. Periodic review can help an employer ensure that employees are properly applying the policy. If an employer finds instances of intentional and/or repeated misuse of the Policy, it should take disciplinary action up to and including termination.

(4) Training. Train all employees subject to the Policy in their primary language on their responsibilities and rights under the Policy. Also, conduct special training for managers and supervisors on how to enforce the Policy and on applicable anti-discrimination laws.

Preventing a Hostile Work Environment

Under state and federal law, an employer may be liable for harassment based on national origin, race and/or color that is severe and pervasive and results in a hostile or abusive work environment for a particular employee or group of employees. The harassment itself can take many forms, including offensive jokes, derogatory comments, graffiti, caricatures and ethnic slurs. Harassment may occur either verbally or in writing, or through e-mails or other methods of delivery. Harassment can be directed at a person's birthplace, ethnicity, language, culture, skin color, facial features or foreign accent.¹⁰

1. Employer Liability for Harassment by Supervisory and Non-Supervisory Staff.

An employer is often in the best position to prevent harassment in the workplace. Under state law, the employer is held responsible for bias-motivated conduct by supervisors and/or managers who subject an employee(s) to a hostile work environment or who fail to properly respond to such conduct by others. An employer is also responsible under the law for non-supervisory co-worker harassment if the employer knew or should have known about the conduct leading to the hostile work environment and did nothing or took ineffective steps to address it. The employer can avoid liability, however, if, upon learning of a complaint of harassment, it promptly, appropriately and successfully takes remedial action.¹¹

2. Employer Liability for Harassment by Residents and Other Non-Employees.

An employer may also be responsible for the failure to respond to a hostile work environment created for an employee(s) by a resident or other third party if the employer is aware of the underlying bias-motivated conduct, but takes no action.¹²

3. Best Practices for Reducing and Addressing Harassment in the Workplace.

(1) Develop an Anti-Harassment Policy. An employer should develop a written Policy which promotes equal opportunity and prohibits unlawful harassment on the basis of national origin, race and/or color, in addition to other protected classes. The Policy should be distributed to all employees, residents and other third parties as necessary.

(2) Establish a Complaint and Investigation Procedure. An employer should maintain an effective process for investigating and responding to complaints of employee and third party harassment which includes a thorough, fair and timely investigation by a qualified person knowledgeable in state and federal anti-discrimination laws and investigation technique. The complaint and investigation procedure should be set forth in the Policy.

(3) Take Appropriate Corrective Action Against Employees. An employer should make a final determination on the merits of each complaint of harassment and if it is determined that the complaint has merit, the employer should take appropriate corrective action against the wrongdoer reasonably calculated to stop any further harassment up to and including termination.

(4) Take Appropriate Corrective Action Against Residents. Even though the nursing home and assisted care industries provide care for residents who may engage in offensive and inappropriate behavior because of their medical and/or mental health conditions,

there are still measured and reasonable steps an employer can take to safeguard the civil rights of a victimized employee:

- (1) Counsel the employee on ways to handle and diffuse the problem with a client of diminished capacity
- (2) Speak directly to the resident and direct the resident to stop the improper conduct
- (3) Offer the employee opportunities to avoid the resident by reassigning duties to someone else who will not similarly experience harassment
- (4) Reassign the employee to a position that takes her to a different work area or building
- (5) Take whatever reasonable additional actions the employer would take if the complainant was a resident

(5) Record Keeping/Monitoring System. The employer should maintain a written record of each complaint filed internally and all complaints filed externally with the MCAD or EEOC which includes the nature of the complaint and the date it was filed, the name of the alleged wrongdoer and the complainant, the final determination and what, if any, corrective action was taken. This information should be centrally maintained and regularly reviewed in order to identify repeat offenders and to track problem sectors within the employer's organization which would benefit from targeted remedial action.

(6) Training. All employees should receive comprehensive training from a qualified trainer about their rights under state and federal fair employment practice laws and their obligation and responsibility to refrain from conduct that violates such laws.

For Additional Information

For more information, please contact the United States Equal Employment Opportunity Commission (617-565-3200), the Massachusetts Commission Against Discrimination (617-994-6000), or the Office of the Massachusetts Attorney General (617-727-2200) or visit their web sites at www.eeoc.gov, www.mass.gov/mcad, or www.ago.state.ma.us.

The "best practices" set forth in this Advisory are guidelines for ensuring that the statutory rights of immigrant workers are protected, but are not necessarily required by state and/or federal law, nor is this advisory issued under G.L. c. 12, §§ 3, 6, or 9.

1. 29 CFR § 1606.7.
2. 29 CFR § 1606.7(a). The Massachusetts Commission Against Discrimination follows the Equal Employment Opportunity Commission's interpretation of the lawfulness of English-only workplace rules.
3. EEOC Compliance Manual Section 13-V, C.1: "Application of Title VII to English-Only Rules."
4. See *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir. 1993) (English-only rule which only applied while employees were working, and was inapplicable to lunch, breaks, or an employee's own time, enhanced product safety of employees on production line under particular work circumstances).

5. The EEOC has brought enforcement actions on behalf of employees who were subject to English-only policies at all times in the workplace and has obtained substantial settlements on their behalf. See, e.g., EEOC v. University of Incarnate Word (UIW) (settlement of case in 2001 brought on behalf of 18 Hispanic housekeepers for \$2.44 million (\$1 million in cash and the rest in tuition credits) where UIW enforced an English-only rule which was applicable at all times, including at lunch and on breaks); EEOC v. Watlow Batavia, Inc. (settlement for \$192,500 on behalf of eight Hispanic assembly line workers who were terminated or unfairly disciplined for refusing to speak only English on the job under a blanket English-only policy); EEOC v. Vencor Inc., (settlement of case in 1999 for \$52,500 in damages on behalf of nine current and former Vencor employees who were disciplined for violating Vencor's discriminatory English-only policy by speaking native languages on breaks and to nursing home residents who spoke the same language). See also www.eeoc.gov/press/4-20-01.html; www.eeoc.gov/origin/lit_examples.html.
6. EEOC Compliance Manual Section 13-V, C.2: "Best Practices."
7. *Garcia v. Spun Steak Company*, 998 F.2d at 1488. ("non-English speakers cannot enjoy the privilege of conversing on the job if conversation is limited to a language they cannot speak. As applied '[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home,' an English-only rule might well have an adverse impact [under Title VII]" (citing *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir.1980)).
8. See, e.g., *EEOC v. Prudential Insurance Co.*, (settlement for \$300,000 in monetary relief on behalf of Haitian workers reprimanded under a language policy enforced to forbid them from speaking Haitian Creole but not enforced against other workers speaking French, Russian, Spanish and other languages). www.eeoc.gov/origin/lit_examples.html.
9. See *Garcia v. Spun Steak Company*, 998 F.2d at 1489.
10. EEOC Compliance Manual Section 13-IV, A: "Title IV's Prohibition Against National Origin Harassment."
11. See *College-Town v. Mass. Commission Against Discrimination*, 400 Mass. 156, 163-166 (1987) (holding an employer vicariously liable for the conduct of a supervisor who creates a sexually hostile work environment and discussing standard for employer liability for similar acts among co-workers). See also *Harley v. Costco Wholesale Corp*, 94-BEM-1716 (June 29, 1999) (MCAD concluded that an employer was liable for employee-on-employee racial harassment where the employer knew of the biased conduct and failed to take prompt and effective remedial action to prevent the development of a racially hostile work environment, including enforcing its policies and adequately training managers and supervisors on how to respond to employee complaints of discriminatory conduct).
12. See *Rosalind v. Handy*, 94 BEM 0989 (March 10, 1999). In this decision the MCAD concluded that a therapeutic center would not be held responsible for an elderly day client's use of derogatory racist comments to repeatedly harass a black

nursing assistant where the facility responded to the nursing assistant's complaints by taking or offering numerous steps, including (1) counseling the CNA, (2) regularly attempting to stop the elderly client's conduct, (3) providing opportunities for the CNA to avoid the conduct, and (4) several times offering the CNA a transfer.