EXCERPT SOURCE:
AALRR ALERT, Fair Employment and Housing Commission Expands National Origin Protections, June 2018

On July 1, 2018, Fair Employment and Housing Commission ("FEHC") regulations will expand the definitions of "national origin" under the Fair Employment and Housing Act (the "FEHA"), applying to all employers (public and private; and includes employment agencies and labor organizations) with more than five (5) employees in California. The regulations increase the number of employees protected under the FEHA, restrict English-only and English-proficiency requirements, and limit actions employers may take regarding immigration status.

It prohibits discrimination and harassment against employees **and** job applicants who fall into defined "protected categories." It also prohibits retaliation against employees or applicants who assert their rights under the law. National origin is one of the protected categories under the FEHA.

Expanded Definition of "National Origin"

Previously, the FEHA did not define "national origin." Rather, under prior case law, "national origin" meant "the country where a person was born" or "the country from which his or her ancestors came." The expanded definition of "national origin" now includes **all** of the following actual or perceived characteristics:

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

As with other categories under the FEHA, protection extends to an individual's "actual or perceived" national origin. Accordingly, an individual may be protected even if he or she is not actually a member of a particular national origin group.

The regulations also explain that "national origin group" includes any ethnic groups, geographic places of origin, and countries that are not presently in existence. Thus, an employee's national origin group could include a country (e.g., Mexico), a former country (e.g., Yugoslavia), or a place that is closely associated with an ethnic group but is not a country (e.g., Kurdistan).

Finally, the new definitions prohibit height and weight requirements that disproportionately affect members of one national origin group. Such requirements must be related to the job and justified by a business necessity. Moreover, the requirement may still be considered unlawful if the applicant or employee can show that the purpose of the height or weight requirement can be achieved another way (reasonable accommodation not posing a hardship to the business, a safety hazard, or violation of other public policy).

English-Only Policies

In addition to redefining "national origin," the new regulations confirm the State's broad restrictions on workplace language policies.

The FEHA states that all language restrictions in the workplace are presumed unlawful.

To implement an English-only rule, an employer must show that (1) the restriction results from a "business necessity," (2) the restriction is "narrowly tailored," and (3) employees have been notified of the specific circumstances and times in which the restriction applies, as well as the consequences for violating it.

A “business necessity” is defined as “an overriding legitimate business purpose,” such that (1) the language restriction is necessary to the safe and efficient operation of the business; (2) the language restriction effectively fulfills the business purpose it is supposed to serve; and (3) there is no alternative practice to the language restriction that would accomplish the business purpose equally well with less discriminatory impact. Notably, the FEHA regulations state that the restriction may not be based on “business convenience” or customer or coworker preference.

A language restriction may not be implemented during an employee’s non-working time, including breaks, lunch, and unpaid events sponsored by the employer.

In addition to these restrictions on language used in the workplace, the FEHA clarifies that discrimination against an employee based on his or her accent is unlawful, unless the employer can show that the accent “interferes materially” with the employee’s ability to perform the job.

Moreover, an employer may not discriminate against an employee based on English proficiency, unless the action is justified by “business necessity.” In this context, proficiency must be required to effectively perform the duties of the job. In deciding whether proficiency is necessary, employers should consider the type of proficiency needed for the job (spoken and written), the level of proficiency needed, and the job’s specific duties. Employers **can** ask applicants or employees for information about their proficiency in any language, if there is a business necessity for doing so.

Inquiries into Immigration Status

One of the more complex aspects of the new regulations involves an employer’s verification of work eligibility. The new rules specify that employers may not inquire into an applicant or employee’s immigration status unless required by federal law. Under the Immigration Reform and Control Act of 1986 (“IRCA”), employers must verify work eligibility using a federal form I-9. However, any inquiry not authorized by IRCA, or another federal law, may violate FEHA regulations.

Moreover, the new FEHC regulations specify that employers may not take adverse action against an employee who updates or attempts to update personal information based on a change of name, social security number, or employment documents. However, IRCA prohibits knowingly hiring or continuing to employ an “unauthorized alien.” Employers may thus find themselves in a difficult situation, and are strongly encouraged to consult with an HR professional or employment attorney before taking action in this circumstance. Threatening to contact immigration or federal law enforcement authorities against an employee or applicant may constitute unlawful harassment or retaliation under the FEHA.